No. 02-361-ATX Title: United States, et al., Appellants
v.
American Library Association, Inc., et al.

Docketed: September 6, 2002 Court: United States District Court for the Eastern District of Pennsylvania

Entry	Date	Proceedings and Orders
	Aug 9 2002	Application (02A112) to extend the time to file a jurisdictional statement on appeal from August 19, 2002 to September 6, 2002, submitted to Justice Souter.
	Aug 9 2002	Application (02A112) granted by Justice Souter extending the time to file until September 6, 2002.
	Sep 6 2002	Statement as to jurisdiction filed. (Response due October 6, 2002)
	Sep 6 2002	Appendix of appellants filed.
	Oct 7 2002	Motion of appellees American Library Association, Inc., et al. to affirm filed.
	Oct 7 2002	Brief amicus curiae of Texas filed.
	Oct 7 2002	Motion of appellees Multnomah County Public Library, et al. to affirm filed.
	Oct 23 2002	DISTRIBUTED for Conference of November 8, 2002
	Oct 29 2002	Reply brief of appellant United States filed.
	Nov 12 2002	PROBABLE JURISDICTION NOTED. SET FOR ARGUMENT March 5, 2003. **********
	Dec 13 2002	Order extending time to file brief of petitioner on the merits and the joint appendix until January 10, 2003.
	Jan 10 2003	Joint appendix filed.
	Jan 10 2003	*Jt. Appendix in three volumes.
	Jan 10 2003	Brief of appellant United States filed.
	Jan 10 2003	Brief amici curiae of National School Boards Association, et al. filed.
	Jan 10 2003	Brief amici curiae of Trent Lott, et al. filed.
	Jan 10 2003	Brief amicus curiae of Texas filed.
	Jan 10 2003	Brief amici curiae of Americn Center for Law and Justice, et al. filed.
	Jan 10 2003	Brief amici curiae of Greenville, SC, et al. filed.
	Jan 10 2003	Brief amici curiae of National Law Center for Children and Families, et al. filed.
	Jan 10 2003	Brief amici curiae of Cities, Mayors and County Commissioners filed.
	Jan 10 2003	Motion of appellees for divided argument filed.
	Jan 22 2003	CIRCULATED.
	Jan 27 2003	Motion of appellees for divided argument DENIED.
	Feb 4 2003	LODGING consisting of twenty spiral bound copies of trial exhibits including two CD-ROMs, received from the Solicitor General and distributed.
	Feb 10 2003	Brief of appellees American Library Association, Inc., et al. filed.
	Feb 10 2003	Brief amicus curiae of Jonathan Wallace d/b/a The Ethical Spectacle filed.
	Feb 10 2003	Brief amici curiae of Online Policy Group, Inc. and Seth Finklestein filed.

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No. 02-361-ATX

Entry	Date	Proceedings and Orders
	Feb 10 2003	Brief amici curiae of Partnership for Progress on the Digital Divide, et al. filed.
	Feb 10 2003	Brief amici curiae of Cleveland Public Library, et al. filed.
	Feb 10 2003	Brief amici curiae of Association of American Publishers, Inc., et al. filed.
	Feb 10 2003	Brief amicus curiae of Brennan Center for Justice at NYU School of Law filed.
	Feb 10 2003	Brief of appellees Multnomah County Public Library, et al. filed.
	Feb 26 2003	Reply brief of appellant United States (TBP) filed.
	Mar 5 2003	ARGUED.

Supreme Court, U.S.
FILED

No. 02 361 SEP 6 2002

OFFICE OF THE CLERK

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

AMERICAN LIBRARY ASSOCIATION, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

The Children's Internet Protection Act (CIPA), Pub. L. No. 106-554, Div. B, Tit. XVII, 114 Stat. 2763A-335, provides that a library that is otherwise eligible for special federal assistance for Internet access in the form of discount rates for educational purposes under the Telecommunications Act of 1996, 47 U.S.C. 254(h) (Supp. V 1999), or grants under the Library Services and Technology Act, 20 U.S.C. 9121 *et seq.*, may not receive that assistance unless the library has in place a policy that includes the operation of a "technology protection measure" on Internet-connected computers that protects against access by all persons to "visual depictions" that are "obscene" or "child pornography," and that protects against access by minors to "visual depictions" that are "harmful to minors." 47 U.S.C. 254(h)(6)(B) and (C) (Supp. V 1999); 20 U.S.C. 9134(f)(1).

The question presented is whether CIPA induces public libraries to violate the First Amendment, thereby exceeding Congress's power under the Spending Clause.

PARTIES TO THE PROCEEDINGS

The following persons and organizations were plaintiffs in the district court: The American Library Association, Inc.; the Freedom to Read Foundation; the Alaska Library Association; the California Library Association; the New England Library Association; the New York Library Association; the Association of Community Organizations for Reform Now; the Friends of the Philadelphia City Institute Library; the Pennsylvania Alliance for Democracy; Elizabeth Hrenda; C. Donald Weinberg; the Multnomah County Public Library; the Connecticut Library Association; the Maine Library Association; the Santa Cruz Public Library Joint Powers Authority; the South Central Library System; the Westchester Library System; the Wisconsin Library Association; Mark Brown; Sherron Dixon, by her father and next friend Gordon Dixon; James Geringer; Marnique Tynesha Overby, by her aunt and next friend Carolyn C. Williams; Emmalyn Rood, by her mother and next friend Joanna Rood; William J, Rosenbaum; Carolyn C. Williams; Quiana Williams, by her mother and next friend Sharon Bernard; Afraidtoask.com; Alan Guttmacher Institute; Ethan Interactive, Inc. d/b/a Out in America; Naturist Action Committee; Wayne L. Parker; Planned Parenthood Federation of Am., Inc.; Planetout.com; Jeffery Pollock; and Safersex.org.

The following persons and organizations were defendants in the court below: The United States of America; the Federal Communications Commission; Michael Powell, in his official capacity as Chairman of the Federal Communications Commission; the Institute of Museum and Library Services; and Robert S. Martin,

in his official capacity as the Director of the Institute of Museum and Library Services (IMLS). Before Robert S. Martin became Director of IMLS, Beverly Sheppard was a defendant in her official capacity as Acting Director of IMLS.

N2H2 was granted leave to intervene for the limited purpose of asserting its confidentiality interests in certain trial exhibits and deposition transcripts.

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In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

AMERICAN LIBRARY ASSOCIATION, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (J.S. App. 1a-191a) is reported at 201 F. Supp. 2d 401.

JURISDICTION

The order of the district court (J.S. App. 191a) was entered on May 31, 2002. A notice of appeal (J.S. App. 209a-211a) was filed on June 20, 2002. The jurisdiction of this Court is invoked under Section 1741(b) of the Children's Internet Protection Act, Pub. L. No. 106-554, Div. B, Tit. XVII, 114 Stat. 2763A-352, and 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 1, Section 8, Clause 1 of the Constitution provides that "[t]he Congress shall have Power to lay

and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." The First Amendment of the Constitution provides that "Congress shall make no law * * * abridging the freedom of speech." The pertinent provisions of the Children's Internet Protection Act (CIPA), Pub. L. No. 106-554, Div. B, Tit. XVII, 114 Stat. 2763A-335, the Telecommunications Act of 1996, 47 U.S.C. 254(h) (Supp. V 1999), and the Library Services and Technology Act, 20 U.S.C. 9121, 9122, 9133, 9134, 9141, are reproduced in a separately bound appendix to this jurisdictional statement. J.S. App. 192a-208a.

STATEMENT

1. Under the Telecommunications Act of 1996, 47 U.S.C. 251 *et seq.*, telecommunications providers must provide Internet access at discounted rates (E-rates) to elementary schools, secondary schools, and libraries for educational purposes. 47 U.S.C. 254(h)(1)(B) (Supp. V 1999). Discounts under the E-rate program reduce the cost of Internet access by 20% to 90%, depending on the extent of economic disadvantage in a particular location. See 47 C.F.R. 54.505. For the year ending June 30, 2002, libraries and library consortia received $58.5 million in E-rate discounts. Joint Trial Stipulations para. 128. The Universal Service Administrative Company administers the E-rate program under the supervision of the Federal Communications Commission. 47 C.F.R. 54.701, 54.702.

The Library Services and Technology Act (LSTA), 20 U.S.C. 9121 *et seq.*, also establishes a program of federal assistance to libraries. Under that program, the Institute of Museum and Library Services makes grants of congressionally appropriated funds to state

library administrative agencies with approved plans. See 20 U.S.C. 9133, 9141. Those grants may be used for, *inter alia*, "electronically linking libraries with educational, social, or information services" and "paying costs for libraries to acquire or share computer systems and telecommunications technologies." 20 U.S.C. 9141(a)(1)(B) and (E). In fiscal year 2002, Congress appropriated more than $149 million in LSTA grants for state library agencies. Joint Trial Stipulations para. 185.

Aided by the E-rate and LSTA programs, libraries have increasingly provided their patrons with access to content on the Internet. In 1996, 44.4% of public libraries in the United States were connected to the Internet. United States Nat'l Comm'n on Libraries and Information Science, *Moving Toward More Effective Public Internet Access: The 1998 National Survey of Public Library Outlet Internet Connectivity* 5 (Mar. 1999). By 2000, 95% of the nation's libraries were connected to the Internet. J.S. App. 36a.

Congress established the E-rate and LSTA programs in order to further the educational, learning, and informational missions of libraries. See 47 U.S.C. 254(h) (Supp. V 1999); 20 U.S.C. 9121, 9141(a)(1)(B). Congress recognized, however, that a library's connection to the Internet could also enable library patrons to obtain access to a vast amount of illegal and harmful pornographic visual depictions. S. Rep. No. 141, 106th Cong., 1st Sess. 2 (1999). Congress was concerned that facilitating access to such pornographic material would be inconsistent with the educational purposes of the assistance it was providing. S. Rep. No. 226, 105th Cong., 2d Sess. 5 (1998). The Senate Committee on Commerce, Science, and Transportation held a hearing to examine the nature of the problem and potential

legislative solutions.[1] During that hearing, evidence was presented that filtering software could provide a reasonably effective way to prevent access to illegal and harmful pornographic material. S. Rep. No. 226, *supra*, at 5-6.

Following the hearing, Congress enacted the Children's Internet Protection Act, which provides that a library may not receive assistance to establish access to the Internet under the E-rate or LSTA program, unless it has a policy of Internet safety that includes the operation of a "technology protection measure" that protects against access by all persons to "visual depictions" that are "obscene" or "child pornography," and that protects against access by minors to "visual depictions" that are "harmful to minors." 20 U.S.C. 9134(f)(1)(A)(i) and (B)(i); 47 U.S.C. 254(h)(6)(B)(i) and (C)(i) (Supp. V 1999). A "technology protection measure" is defined as "a specific technology that blocks or filters Internet access to" material covered by CIPA. 47 U.S.C. 254(h)(7)(I) (Supp. V 1999).[2]

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[1] See *The Children's Internet Protection Act: Hearing on S. 97 Before the Senate Comm. on Commerce, Science and Transportation*, 106th Cong., 1st Sess. (1999).

[2] CIPA adopts the definitions of "obscene" and "child pornography" set forth in the federal criminal code. 20 U.S.C. 9134(f)(7)(D); 47 U.S.C. 254(h)(7)(E) (Supp. V 1999) (incorporating 18 U.S.C. 1460's definition of "obscene"); 20 U.S.C. 9134(f)(7)(A); 47 U.S.C. 254(h)(7)(F) (Supp. V 1999) (incorporating 18 U.S.C. 2256's definition of "child pornography"). CIPA defines "harmful to minors" as "any picture, image, graphic image file or other visual depiction that—(i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion; (ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and (iii) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors." 20 U.S.C. 9134(f)(7)(B); 47 U.S.C. 254(h)(7)(G) (Supp. V 1999). CIPA defines a "minor" as an individual under the age of 17. 20 U.S.C. 9134(f)(7)(C); 47 U.S.C. 254(h)(7)(D) (Supp. V 1999).

CIPA permits the "disabling" of a technology protection measure "to enable access for bona fide research or other lawful purposes." 20 U.S.C. 9134(f)(3); 47 U.S.C. 254(h)(6)(D) (Supp. V 1999). Under the E-rate program, disabling is permitted "during use by an adult." 47 U.S.C. 254(h)(6)(D) (Supp. V 1999). Under the LSTA program, disabling is permitted during use by any person. 20 U.S.C. 9134(f)(3).

Congress enacted CIPA pursuant to its authority under the Spending Clause of the Constitution, Article I, Section 8, Clause 1, to establish conditions on the receipt of federal assistance. S. Rep. No. 141, *supra*, at 8. Congress made clear that if a library wishes to provide unfiltered access, it may do so with its own funds. S. Rep. No. 226, *supra*, at 5. Congress also noted that CIPA involves filtering material based on its sexually explicit content, not based on its viewpoint. *Ibid.*

Congress also understood that a library is not a traditional public forum open to unrestricted First Amendment activity. Congress was aware that libraries impose strict rules to maintain "an atmosphere for reading and study," that "[p]atrons are not permitted to give speeches, make public statements, sing, [or] speak loudly," and that "[i]t is the exclusive authority of the library to make affirmative decisions regarding what books, magazines, or other material is placed on library shelves, or otherwise made available to patrons." S. Rep. No. 141, *supra*, at 8. Congress did not view a decision to provide Internet access as funda-

mentally altering the library's mission. Instead, it viewed such access as a component of the library's overall assembling of a collection. In Congress's judgment, connecting a library computer to the Internet "is simply another method for making information available in a * * * library. It is no more than a technological extension of the book stack." *Id.* at 7.

2. A group of libraries, library associations, library patrons, and web site publishers (appellees) filed suit in the United States District Court for the Eastern District of Pennsylvania against the United States and the government agencies and officials responsible for administering the E-rate and LSTA programs, challenging the constitutionality of CIPA's filtering provisions. J.S. App. 5a. Appellees alleged that CIPA is facially unconstitutional because it induces public libraries to violate the First Amendment, and because it imposes an unconstitutional condition on a library's exercise of its own First Amendment rights. *Ibid.* Pursuant to Section 1741(a) of CIPA, a three-judge district court was convened. J.S. App. 6a. After a trial, the district court held that CIPA is facially unconstitutional because it induces public libraries to violate the First Amendment rights of their patrons. *Id.* at 13a. The court accordingly enjoined the government agencies and officials responsible for administering the E-rate and LSTA programs from withholding federal assistance from any public library for failure to comply with CIPA. *Id.* at 191a.

The district court analyzed the constitutionality of CIPA under the framework for Spending Clause legislation set forth in *South Dakota* v. *Dole*, 483 U.S. 203, 207-210 (1987). J.S. App. 95a. Under that decision, the district court explained, Congress may not use its spending power "to induce the States to engage

in activities that would themselves be unconstitutional." *Ibid.* (quoting *Dole*, 483 U.S. at 210). For purposes of its analysis under *Dole*, the district court assumed that CIPA would be facially unconstitutional only if "any public library that complies with CIPA's conditions will necessarily violate the First Amendment." *Id.* at 102a. The court held that CIPA is facially unconstitutional when measured against that standard. *Ibid.*

The district court acknowledged that "generally the First Amendment subjects libraries' content-based decisions about which print materials to acquire for their collections to only rational [basis] review." J.S. App. 120a. But the court refused to apply that same constitutional analysis to libraries' content-based decisions regarding material they acquire from the Internet. *Id.* at 121a. The court reasoned that rational basis review applies to a government's "editorial discretion in selecting certain speech for subsidization or inclusion in a state-created forum" only when "the state actor exercising the editorial discretion has at least reviewed the content of the speech that the forum facilitates." *Ibid.* In the court's view, "[t]his exercise of editorial discretion is evident in a library's decision to acquire certain books for its collection." *Id.* at 122a. In contrast, the court continued, "in providing patrons with even filtered Internet access, a public library invites patrons to access speech whose content has never been reviewed and recommended as particularly valuable by either a librarian or a third party to whom the library has delegated collection development decisions." *Id.* at 123a. Based on its understanding that a library that provides Internet access "indiscriminately facilitates private speech whose content it makes no effort to examine," *id.* at 125a, the court

concluded that a library that offers Internet access necessarily creates a "designated public forum," *id.* at 109a.

The court next held that a public library's content-based restrictions on access to that "forum" trigger strict scrutiny. J.S. App. 128a. Based on its analysis of this Court's public forum and government subsidy decisions, *id.* at 127a-128a, the district court concluded that "where a public library opens a forum to an unlimited number of speakers around the world to speak on an unlimited number of topics, strict scrutiny applies to the library's selective exclusions of particular speech whose content the library disfavors," *id.* at 128a. The court also concluded that strict scrutiny is applicable based on its understanding that a library's provision of Internet access "promotes First Amendment values in an analogous manner to traditional public fora, such as sidewalks and parks, in which content-based restrictions on speech are always subject to strict scrutiny." *Ibid.*

Applying strict scrutiny, the district court first held that the government has a "well-established" compelling interest "in preventing the dissemination of obscenity, child pornography, or, in the case of minors, material [that is] harmful to minors." J.S. App. 139a. The court next concluded that, in certain circumstances, "a public library might have a compelling interest in protecting library patrons and staff from unwilling exposure to sexually explicit speech that, although not obscene, is patently offensive." *Id.* at 146a. Furthermore, the court found that "[t]he volume of pornography on the Internet is huge," and that "library patrons of all ages, many from 11 to 15, have regularly sought to access it in public library settings." *Id.* at 2a. The district court nonetheless held that a public

library's use of software filters to prevent access to categories such as "full nudity" and "sexual activity" (3/28/02 Biek Test. 29) is not narrowly tailored to further the government's interests. J.S. App. 149a. The court found that because of the limits of technology, filters set to prevent access to those categories also restrict "many thousands of Web pages that are clearly not harmful to minors, and many thousands more pages that, while possibly harmful to minors, are neither obscene nor child pornography." *Id.* at 148a-149a.

The district court also concluded there are less restrictive ways to prevent access to the content covered by CIPA. J.S. App. 157a-167a. The court determined that libraries "can adopt Internet use policies that make clear to patrons that the library's Internet terminals may not be used to access illegal content," and they "can detect violations of their Internet use policies either through direct observation or through review of the library's Internet use logs." *Id.* at 158a-159a. The court similarly determined that there are less intrusive methods to prevent patrons from "unwillingly being exposed to patently offensive, sexually explicit content," such as "plac[ing] unfiltered terminals outside of patrons' sight-lines and areas of heavy traffic" and "us[ing] privacy screens or recessed monitors." *Id.* at 165a-166a.

Finally, the district court held that CIPA's provisions permitting the disabling of filtering software do not cure CIPA's lack of narrow tailoring. J.S. App. 167a-177a. The court "assume[d] without deciding that the disabling provisions permit libraries to allow a patron access to any speech that is constitutionally protected with respect to that patron." *Id.* at 170a. It nonetheless held that "the requirement that library patrons ask

a state actor's permission to access disfavored content violates the First Amendment." *Ibid.* The court reasoned that patrons would be deterred from asking for permission to obtain access to information that is "sensitive in nature." *Id.* at 172a. While the court recognized that libraries may permit anonymous requests to disable filtering software, it regarded that option as inadequate because "such requests cannot immediately be acted on." *Id.* at 174a.[3]

THE QUESTION PRESENTED IS SUBSTANTIAL

This case involves a challenge to the constitutionality of two provisions of the Children's Internet Protection Act under which a public library may not receive federal assistance for Internet access unless it uses filtering software that prevents patrons from obtaining access to visual depictions on the Internet that are obscene, child pornography, or (in the case of minors) harmful to minors. The district court declared those

[3] In a lengthy footnote (J.S. App. 180a-188a n.36), the district court discussed appellees' alternative contention that CIPA imposes an unconstitutional condition on the First Amendment rights of libraries. In the course of that discussion, the court expressed the view that appellees' position that public libraries may assert First Amendment rights "may well be correct." *Id.* at 184a n.36. The court also stated that public libraries might also be able to "rely on their patrons' rights, even though their patrons are not the ones who are directly receiving the federal funding." *Ibid.* And the court further stated "that [appellees] have a good argument that CIPA's requirement that public libraries' use [of] filtering software distorts the usual functioning of public libraries in such a way that it constitutes an unconstitutional condition on the receipt of funds." *Id.* at 188a n.36. But the court ultimately did not resolve any of those issues. *Id.* at 179a-180a & 188a n.36. The court also did not address appellees' contentions that CIPA constitutes an invalid prior restraint on speech and is unconstitutionally vague. *Id.* at 179a.

two provisions unconstitutional on their face and enjoined their enforcement.

The district court's decision directly frustrates Congress's effort to ensure that special federal assistance made available to libraries to enable them to establish and maintain access to the Internet for educational and other purposes does not facilitate access to the enormous amount of illegal and harmful pornography on the Internet. Equally disturbing, by holding that a public library's use of filtering software to prevent access to the visual depictions covered by CIPA violates the First Amendment, the district court's decision deprives all the nation's public libraries—without regard to whether they receive federal assistance—of the ability to make their own independent judgments concerning how to avoid becoming a conduit for illegal and harmful material.

The district court's First Amendment holding is incorrect. A public library may exercise content-based judgments in deciding what information to make available to its patrons without violating the First Amendment. That principle not only applies to a library's acquisition of books, magazines, and videos; it also applies to a library's decisions regarding the material it will provide through its Internet-connected computers. A library that refuses to make available to its patrons pornographic magazines or XXX videos may also refuse to make available comparable material through those computers.

CIPA specifies that a decision holding its filtering provisions unconstitutional "shall be reviewable as a matter of right by direct appeal" to this Court. Pub. L. No. 106-554, App. D, § 1741(b), 114 Stat. 2763A-352. Because the district court invalidated important provisions of an Act of Congress on their face and did so

based on an erroneous constitutional analysis, the Court should note probable jurisdiction of the government's appeal and set the case for plenary review.

A. THE QUESTION PRESENTED IS IMPORTANT

This case involves the facial validity of Congress's effort in CIPA to ensure that federal assistance to libraries to establish Internet access does not facilitate access to visual depictions that are obscene, child pornography, or harmful to minors. Two CIPA provisions are at issue. The first provides that a library may not receive E-rate discounts for Internet service for educational purposes unless the library has in place a policy that includes the operation of a "technology protection measure" on Internet-connected computers that protects against access by all persons to "visual depictions" that are "obscene" or "child pornography," and that protects against access by minors to "visual depictions" that are "harmful to minors." 47 U.S.C. 254(h)(6)(B)-(C) (Supp. V 1999). The second provision at issue imposes the same condition on a library's receipt of grants to establish Internet access under the Library Services and Technology Act. 20 U.S.C. 9134(f)(1).

The district court expressly held that each of those provisions "is facially invalid, since [each] will induce public libraries, as state actors, to violate the First Amendment." J.S. App. 179a. The court's invalidation of CIPA's filtering provisions has profound consequences for both the federal government and the nation's public libraries. The court's ruling eliminates the protection Congress adopted to ensure that the assistance it provides to libraries to facilitate access to the wealth of valuable information on the Internet does not simultaneously enable access to the enormous

amount of illegal and harmful pornography that pervades the Internet.

The consequences for the nation's public libraries are equally unsettling. Public libraries often have policies that preclude the use of Internet-connected computers to obtain access to pornographic visual depictions, J.S. App. 37a, and, as of June 2000, 7% of those libraries already used filtering software on all of their computers as a means of furthering those policies, *id.* at 45a. The district court's ruling flatly condemns the use of any filtering software to enforce standard library policies against access to pornography. *Id.* at 179a. Moreover, under the district court's view that strict scrutiny applies to any content-based restriction on Internet access, *id.* at 128a, the standard policies of libraries to prevent access to pornographic visual depictions are themselves presumptively unconstitutional and may survive only if they are narrowly tailored to further compelling interests. The question presented in this case—whether CIPA's filtering provisions induce public libraries to violate the First Amendment rights of their patrons—is therefore one of great public importance.

B. CIPA'S FILTERING PROVISIONS ARE FACIALLY VALID

The district court erred in holding that CIPA is facially unconstitutional. While Congress may not use its spending authority "to induce the States to engage in activities that would themselves be unconstitutional," *Dole*, 483 U.S. at 210, CIPA does no such thing. A public library's use of filtering software to prevent its computers from being used to obtain access to the pornographic material covered by CIPA is a constitutionally permissible means for a public library to

exercise control over the material that it provides to its patrons. The district court's contrary conclusion rests on an unprecedented and erroneous application of strict scrutiny to a public library's exercise of editorial judgment.

1. A Public Library Does Not Create A Forum When It Provides Internet Access Through Its Own Computers, And Its Judgments Regarding The Material It Will Make Available Are Not Subject To Strict Scrutiny

a. The district court's application of strict scrutiny rests on the court's mistaken view that a public library creates a public forum when it provides access to content on the Internet through its own computers. A public library's exercise of judgment in selecting the material it will make available to its patrons is not subject to forum analysis. Forum analysis and its accompanying heightened judicial scrutiny are incompatible with the long-established and necessary discretion that public libraries must have to fulfill their traditional missions.

The first public library, the Boston Public Library, opened in 1854, and had as its original mission "to promote equality of education opportunity, to advance scientific investigation, to save youth from the evils of an ill-spent leisure, and to promote the vocational advancement of the workers." Expert Report of Donald G. Davis, Jr. 2. Over time, public libraries began to collect materials to serve additional purposes. For example, driven in part by a desire to serve broader community interests, libraries collect popular fiction as well as more traditional works. But facilitating learning and cultural enrichment has remained the traditional mission for most public libraries. Indeed,

the American Library Association's Bill of Rights still provides that "[b]ooks and other library resources should be provided for the interest, information, and enlightenment of all people of the community the library serves." J.S. App. 32a.

Consistent with their missions, libraries have always exercised judgment in deciding what materials to collect. In performing that important function, libraries have considered the content and value of available works as well as the needs and interests of the community. J.S. App. 35a. Libraries often rely on journal reviews and bibliographies as selection aids and establish standards to guide their collection decisions. *Ibid.* Libraries may also delegate to third party vendors the task of supplying resources that satisfy the library's collection standards. *Ibid.* In all cases, however, libraries remain responsible for the content of their collections. *Ibid.* Consistent with their traditional mission and their overriding responsibility to the communities that they serve, most libraries exclude pornographic works from their collections. 3/29/02 Cronin Test. 91. Only a handful of libraries collect Hustler magazine or XXX movie titles. J.S. App. 33a & n.4.

No decision of this Court suggests that forum analysis applies to a public library's traditional collection practices and decisions. Still less do this Court's decisions suggest that public libraries must justify the judgments they make in assembling their collections as narrowly tailored to further compelling interests. To the contrary, this Court's precedents make clear that the government has broad discretion to decide whether material is sufficiently worthwhile to involve the government in providing it. *NEA* v. *Finley*, 524 U.S. 569, 585-588 (1998); *Arkansas Educ. Television Comm'n* v.

Forbes, 523 U.S. 666, 672-675 (1998); *Rust* v. *Sullivan*, 500 U.S. 173, 193-194 (1991). That principle applies with particular force to public libraries.

Any other approach would risk transforming the role of public libraries in our society. Instead of public libraries exercising responsibility for the resources that they make available to the public, forum analysis would threaten to substitute judicial judgments regarding what is appropriate. Cf. *Arkansas Educ. Television*, 523 U.S. at 674. A public library's traditional exercise of discretion to determine what materials to collect would be particularly threatened by application of strict scrutiny to collection decisions, which would require a library to establish that a challenged decision furthers a "compelling" interest, and that "plausible" less restrictive alternatives would not be effective. *United States* v. *Playboy Entm't Group, Inc.*, 529 U.S. 803, 813, 816 (2000). Libraries would often be hard-pressed to show that the selection of one resource rather than another always furthers a "compelling" government interest. Nor are libraries likely to be in a position to demonstrate that there are no "plausible" alternatives that would be less restrictive, while still serving the library's overall collection goals. Libraries would also be vulnerable to charges that they have collected too many or too few works containing particular viewpoints. The very prospect of strict judicial review of collection decisions could chill libraries from exercising traditional editorial judgments.

b. The district court accepted the principle that libraries may select books for their collections on the basis of content without triggering strict scrutiny. Such collection decisions, the court concluded, are subject only to rational basis review. J.S. App. 120a. But the court refused to apply that same analysis to a

public library's editorial judgments regarding the content that it makes available through its Internet-connected computers. The court reasoned that, because public libraries do not exercise individualized judgments regarding the value of all web sites that they make available through their computers, they create public forums, from which any content-based exclusion must be justified under strict scrutiny. *Id.* at 125a-128a. That analysis is seriously flawed.

A public library does not provide Internet access in order to create a public forum for web publishers to speak, any more than it collects books in order to provide a public forum for the authors of the books to speak. It provides Internet access for the very same reasons that it offers other library resources—to facilitate research, learning, and enlightenment. Because of the vast amount of material on the Internet, and its ever-changing nature, it would be impossible for any public library to review every web site and make an individualized determination regarding whether that site has sufficient value to further the library's mission. But a public library's inability to review every web site in advance does not divest it of its traditional authority to make selective judgments regarding the information that it will provide to its patrons. The Internet does not need to be, as the district court assumed, an all-or-nothing proposition. Indeed, many libraries have taken actions demonstrating efforts to exercise the same kind of editorial judgments concerning the Internet that they routinely apply to other media.

For example, many libraries have decided that certain web sites have particular value, and they therefore provide links to those sites on the first screen a patron views on the library's computers. Joint Trial Stipulations para. 268. That judgment plainly gives

certain web speakers preferred access to library patrons on the basis of the content of their web sites. But it would be extraordinary to suggest that such a decision by a public library is presumptively unconstitutional.

Similarly, many libraries exercise their discretion to preclude the use of their computers to obtain access to certain Internet resources. For example, some libraries do not allow patrons to use the libraries' computers to send and receive e-mail messages or to participate in chat rooms because they regard the Internet primarily as a research and information tool. J.S. App. 37a-38a; GX 33, at 2-3, 83. Other libraries have concluded that web sites that include games, personals, or dating services are not sufficiently valuable or compatible with the libraries' mission to justify providing access to them. J.S. App. 37a-38a; GX 33, at 2-3, 83. Still others prevent access to sites that contain graphic violence or tasteless material. GX 71, 83, 99, 242, 244, 247. Those decisions reflect the same kind of judgments that libraries make when they decide what books, magazines, tapes, CD-ROMS, and videos to add to their collections. Nothing in this Court's First Amendment jurisprudence suggests that those decisions should be subjected to forum analysis, much less to strict scrutiny.

The same is true when a library decides to prevent its computers from being used to obtain access to visual depictions that are obscene, child pornography, or harmful to minors by enabling their computers to filter out such categories as "sexual activity" and "full nudity." If libraries have the discretion to refrain from including pornographic magazines and XXX movies in their collections, as they unquestionably do, there is no reason that a library's judgment not to offer access to

comparable material on the Internet should be treated as inherently suspect and presumptively unconstitutional.

c. In invoking forum analysis and applying strict scrutiny, the district court confused the constitutional status of the Internet itself with the constitutional status of a library's decision whether to allow the use its own computers to provide access to various types of material on the Internet. The Internet itself is a forum for First Amendment activity, but it is not one that is government-owned. When government places restrictions on what content may be placed on the Internet, it acts as a regulator of private activity, and its restrictions are subject to strict scrutiny. *Reno* v. *ACLU*, 521 U.S. 844 (1997). In contrast, when a public library brings Internet content into the library through its own computers, it acts as a collector of materials that it will make available to its patrons. In that capacity, the library necessarily has both the responsibility and the discretion to decide how little or how much of the Internet's content to provide. A web site publisher has no more right to insist on access to library patrons through library computers than a book author has to insist on access to library patrons through a library's book stacks.

d. Acceptance of the district court's contrary view would produce a number of startling consequences. Under the district court's analysis, a public library that provides Internet access only to the limited number of web sites the library regards as having particular value would have broad discretion to make those selection decisions. In contrast, a public library that provides access to a much wider range of materials without making individualized value judgments, but prevents access to certain materials because the library

determines that they lack sufficient value or are not sufficiently related to its mission, would have to justify its selection decisions under strict scrutiny. The district court's approach would therefore create a perverse incentive for a library to make available *less* information to its patrons in order to preserve its traditional discretion.

The district court's analysis would also seem to extend to any other resource to which a library makes a connection. For example, if a library establishes a television room with cable access, it would have to satisfy strict scrutiny to justify a decision to block programs that contain frontal nudity. Similarly, a library that offers telephone service to its adult patrons would have to satisfy strict scrutiny to preclude the use of the phone to obtain access to dial-a-porn.

Those consequences underscore the fundamental flaw in the district court's analysis. A public library has broad discretion to make content-based judgments regarding the material it makes available to the public, and forum analysis and strict scrutiny have no application to those decisions.[4]

2. Even If A Library's Connection Of Its Computers To The Internet Created A Forum, Strict Scrutiny Would Not Apply

Even if a public library's Internet-connected computers were subjected to forum analysis, strict scrutiny would not apply to a library's use of filtering software.

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[4] The district court's analysis would also seem to apply no matter where the government locates an Internet-connected computer. Under the court's analysis, a government that provides access to the Internet at city hall or a public hospital would have to justify under strict scrutiny its decision to use a filter to block illegal and harmful pornographic content.

"[T]he Court [has] identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). Traditional public fora are limited to those venues such as streets and parks that have "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communication of thoughts between citizens, and discussing public questions." *International Soc'y for Krishna Consciousness, Inc.*, v. *Lee*, 505 U.S. 672, 679 (1992) (quoting *Hague* v. *Committee for Indus. Org.*, 307 U.S. 496, 515 (1939)). The Court "has rejected the view that traditional public forum status extends beyond its historic confines." *Arkansas Educ. Television*, 523 U.S. at 678. Accordingly, if forum analysis were applicable to a library's Internet-connected computers, they could only be non-public fora or designated public fora. In either event, strict scrutiny would not apply to a library's use of filtering software to prevent access to material covered by CIPA.

The government may limit access to a non-public forum "based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purposes served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806. In a designated forum, the government may limit the forum to certain purposes, and then impose limitations that are "reasonable in light of the purpose served by the forum." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (quoting *Cornelius*, 473 U.S. at 406). A content restriction is permissible in such a forum "if it preserves the purposes of [the] limited forum," while viewpoint discrimination "is pre-

sumed impermissible when directed against speech otherwise within the forum's limitations." *Id.* at 830.

The use of filtering software to prevent access to the graphic depictions covered by CIPA does not involve any distinctions based on viewpoint. See *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 384 (1992); *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 684-685 (1986). *FCC* v. *Pacifica Found.*, 438 U.S. 726, 745-746 (1978) (plurality opinion). Moreover, libraries may regard the purposes of providing access to the Internet not to encompass providing access to the illegal, harmful, and low-value content covered by CIPA, just as many libraries view the purposes of collecting magazines not to encompass providing access to pornographic magazines. Consequently, if a library's Internet-connected computers were subjected to forum analysis, the relevant inquiry would not be whether the use of filtering software is narrowly tailored to achieve compelling interests, but whether its use is "reasonable in light of the purposes served by the forum." *Cornelius*, 473 U.S. at 806; *Rosenberger*, 515 U.S. at 839.

3. Regardless Of The Standard Of Review, A Library's Use Of Filtering Software Is Constitutionally Permissible

Under the correct constitutional analysis, a library's use of filtering software to prevent access to material covered by CIPA is subject to rational basis review. See pp. 14-20, *supra*. Under that standard, the constitutionality of using filtering software to prevent access to material covered by CIPA cannot reasonably be questioned. But regardless of whether the appropriate standard of review is "rational basis," "reasonable in light of the purposes served by the forum," or "strict scrutiny," a library's use of filtering software is a permissible exercise of the library's editorial discretion to determine what content it will make available to its patrons.

a. The district court concluded that the use of filtering software is constitutionally deficient because all leading commercial filters block a substantial amount of material that does not fit into the categories identified by CIPA or the software categories, such as "sexual activity and "full nudity," that best capture CIPA material. J.S. App. 149a. For several reasons, that technological imperfection does not call into question the constitutionality of filtering software.

First, the district court's own findings show that filtering software erroneously blocks a fraction of 1% of the material on the Internet. J.S. App. 85a (finding that one or more of the leading filtering programs erroneously blocked several thousand sites in a 500,000 web site sample that was deliberately skewed to overstate the degree of overblocking). Second, much information that is erroneously blocked can be found on another web site or on the library's bookshelves. 4/1/02 Davis Test. 92 (much information can be found on other sites); 3/28/02 Biek Test. 97-98 (finding that the first 50 sites in a search of "breast cancer" were not blocked); J.S. App. 33a (finding that many libraries carry the *The Joy of Sex* and *The Joy of Gay Sex*). Third, libraries have the capacity to permanently unblock an erroneously blocked site. *Id.* at 46a. Finally, CIPA authorizes a library to disable filtering software altogether "to enable access for bona fide research or other lawful purposes." 20 U.S.C. 9134(f)(3) (all patrons) (LSTA program); 47 U.S.C. 254(h)(6)(D) (Supp. V 1999) (adults only) (E-rate program).

Because of the first two factors, a patron will rarely need to obtain access to a site that has been blocked in

order to obtain the information he or she seeks at the library. Because of the last two factors, in the rare cases in which a patron is unable to find the information, the patron need only ask a librarian to unblock the site or (at least in the case of adults) disable the filter.

The district court viewed unblocking and disabling as inadequate because some patrons may be too embarrassed to ask for assistance from a librarian. J.S. App. 172a. Throughout the history of libraries, however, patrons have asked for help when they could not find the information they needed by themselves. Moreover, anyone who has been in a library knows that most librarians are eager to provide such assistance, and that they do so without intruding on privacy. Indeed, librarians answer more than seven million questions weekly. *Id.* at 33a-34a.

In any event, a library has the ability to process anonymous unblocking requests. J.S. App. 173a. As the district court noted, such requests may not always be processed immediately. *Id.* at 174a. But the district court's view that a patron of a public library has a First Amendment right to demand that librarians immediately process a request for information, rather than perform their myriad other responsibilities, is unprecedented and insupportable. The patron always has the option to seek access to the Internet somewhere else, rather than through the computers made available at the local public library.

b. The district court also found that there are less restrictive and equally effective ways to preclude access on computers in a public library to the pornographic visual depictions covered by CIPA. In particular, the court concluded that libraries can make clear to patrons that the library's Internet terminals may not be used to obtain access to illegal or harmful content,

and libraries can detect violations through direct observation or through logs that reveal all the sites that a patron selects. J.S. App. 158a-159a. But a system under which librarians closely monitor everyone using computers to make sure that they are not viewing material covered by CIPA would be far more intrusive, not less intrusive, than the use of filtering software. Such a regime also would materially alter the experience of visiting the library for patrons generally, including the many who prefer to steer clear (and to have their children steer clear) of pornographic web sites and would be quite content to have the library help them do so. With respect to all other media, libraries are free to make a judgment that material that would be harmful to a substantial portion of patrons should not be provided to any patrons to avoid the need for such counterproductive monitoring. Libraries should be free to make the same judgment as to the Internet.

It is also difficult to see how the district court's alternative would withstand the court's constitutional analysis. If, as the district court held, requiring a patron to request unblocking would be unconstitutional because it would deter some patrons from seeking useful information, close monitoring of patrons would seemingly be unconstitutional as well because it too would deter some patrons from seeking useful information.

The district court's proposed alternative would also risk transforming the role of a librarian from an aid to whom patrons turn for assistance in finding information into a compliance officer that many patrons might wish to avoid. Such a fundamental change in the relationship between patrons and librarians would retard rather than promote First Amendment values. Under the

court's alternative, moreover, librarians would be needlessly exposed to material that many would prefer not to see.

Those difficulties could be largely avoided through reliance on an honor system in which the library simply announces a policy and hopes it will be followed. But it is implausible to suggest that such a hands-off approach would be as effective as the use of a filtering device. Moreover, such a toothless policy would also have difficulty surviving the district court's version of strict scrutiny. A challenger could readily argue that such an approach would deter compliant patrons from viewing material that is constitutionally protected, but close to the line, while having no effect on patrons who are determined to obtain access to illegal or harmful content.[5]

In the end, the only way for a library to comply with the district court's decision may be to refrain from adopting any Internet policy, and to leave access decisions entirely in the hands of library patrons. Some libraries may wish to adopt such a policy, but the First

[5] The district court concluded that a library could protect patrons from unwilling exposure to depictions covered by CIPA by moving terminals to places where their displays cannot easily be seen by other patrons, or by purchasing privacy screens or recessed monitors. J.S. App. 165a-166a. But those alternatives would not prevent the patrons at the computers from obtaining access to visual depictions that are child pornography, obscene, or harmful to minors. To the contrary, by making it more difficult for library officials to monitor activity on the computers, the court's alternatives would make it easier for patrons to obtain access to the visual depictions covered by CIPA. Those alternatives also would not address the interest of librarians in avoiding unwilling exposure.

Amendment surely does not require it, and Congress need not subsidize it.

In sum, Congress permissibly conditioned the federal assistance it provides to public libraries to establish Internet access on a library's willingness to use filtering software to prevent access to depictions on the Internet that are child pornography, obscene, or harmful to minors. The district court erred in holding that CIPA thereby causes public libraries to violate the First Amendment.[6]

[6] There is also no merit to appellees' alternative contention that CIPA imposes an unconstitutional condition on a library's First Amendment right to provide unfiltered access to the Internet. This Court has never addressed whether governmental entities have First Amendment rights. But the courts of appeals that have addressed the issue have concluded that they do not. *Warner Cable Communications, Inc.* v. *City of Niceville*, 911 F.2d 634, 638 (11th Cir. 1990), cert. denied, 501 U.S. 1222 (1991); *NAACP* v. *Hunt*, 891 F.2d 1555, 1565 (11th Cir. 1990); *Student Gov't Ass'n* v. *Board of Trustees of Univ. of Mass.*, 868 F.2d 473, 481 (1st Cir. 1989). In any event, Congress may define a federally assisted program to include limitations on speech-related activity without violating the First Amendment rights of the recipients, provided that the recipients may continue to engage in the speech-related activity outside the federal program. *Rust*, 500 U.S. at 196; *FCC* v. *League of Women Voters*, 468 U.S. 364, 400 (1984); *Regan* v. *Taxation with Representation*, 461 U.S. 540, 545-546 (1983). That standard is satisfied here. Libraries that accept federal assistance are free to establish unfiltered computers at facilities or branches that do not receive assistance under the E-rate or LSTA programs.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

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SUPREME COURT, U.S.
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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

AMERICAN LIBRARY ASSOCIATION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

APPENDIX TO THE JURISDICTIONAL STATEMENT

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Nos. CIV.A. 01-1303 CIV.A. 01-1322

AMERICAN LIBRARY ASSOCIATION, INC., ET AL.

v.

UNITED STATES, ET AL.

MULTNOMAH COUNTY PUBLIC LIBRARY, ET AL.

v.

UNITED STATES OF AMERICA, ET AL.

[May 31, 2002]

OPINION OF THE COURT

Before: BECKER, Chief Circuit Judge, FULLAM and BARTLE, District Judges.

EDWARD R. BECKER, Chief Circuit Judge.

I. Preliminary Statement

This case challenges an act of Congress that makes the use of filtering software by public libraries a condition of the receipt of federal funding. The Internet, as is well known, is a vast, interactive medium based on a decentralized network of computers around the world. Its most familiar feature is the World Wide Web (the "Web"), a network of computers known as servers that provide content to users. The Internet provides easy

access to anyone who wishes to provide or distribute information to a worldwide audience; it is used by more than 143 million Americans. Indeed, much of the world's knowledge accumulated over centuries is available to Internet users almost instantly. Approximately 10% of the Americans who use the Internet access it at public libraries. And approximately 95% of all public libraries in the United States provide public access to the Internet.

While the beneficial effect of the Internet in expanding the amount of information available to its users is self-evident, its low entry barriers have also led to a perverse result—facilitation of the widespread dissemination of hardcore pornography within the easy reach not only of adults who have every right to access it (so long as it is not legally obscene or child pornography), but also of children and adolescents to whom it may be quite harmful. The volume of pornography on the Internet is huge, and the record before us demonstrates that public library patrons of all ages, many from ages 11 to 15, have regularly sought to access it in public library settings. There are more than 100,000 pornographic Web sites that can be accessed for free and without providing any registration information, and tens of thousands of Web sites contain child pornography.

Libraries have reacted to this situation by utilizing a number of means designed to insure that patrons avoid illegal (and unwanted) content while also enabling patrons to find the content they desire. Some libraries have trained patrons in how to use the Internet while avoiding illegal content, or have directed their patrons to "preferred" Web sites that librarians have reviewed. Other libraries have utilized such devices as recessing

the computer monitors, installing privacy screens, and monitoring implemented by a "tap on the shoulder" of patrons perceived to be offending library policy. Still others, viewing the foregoing approaches as inadequate or uncomfortable (some librarians do not wish to confront patrons), have purchased commercially available software that blocks certain categories of material deemed by the library board as unsuitable for use in their facilities. Indeed, 7% of American public libraries use blocking software for adults. Although such programs are somewhat effective in blocking large quantities of pornography, they are blunt instruments that not only "underblock," i.e., fail to block access to substantial amounts of content that the library boards wish to exclude, but also, central to this litigation, "overblock," i.e., block access to large quantities of material that library boards do not wish to exclude and that is constitutionally protected.

Most of the libraries that use filtering software seek to block sexually explicit speech. While most libraries include in their physical collection copies of volumes such as *The Joy of Sex* and *The Joy of Gay Sex*, which contain quite explicit photographs and descriptions, filtering software blocks large quantities of other, comparable information about health and sexuality that adults and teenagers seek on the Web. One teenager testified that the Internet access in a public library was the only venue in which she could obtain information important to her about her own sexuality. Another library patron witness described using the Internet to research breast cancer and reconstructive surgery for his mother who had breast surgery. Even though some filtering programs contain exceptions for health and education, the exceptions do not solve the problem of

overblocking constitutionally protected material. Moreover, as we explain below, the filtering software on which the parties presented evidence in this case overblocks not only information relating to health and sexuality that might be mistaken for pornography or erotica, but also vast numbers of Web pages and sites that could not even arguably be construed as harmful or inappropriate for adults or minors.

The Congress, sharing the concerns of many library boards, enacted the Children's Internet Protection Act ("CIPA"), Pub. L. No. 106-554, which makes the use of filters by a public library a condition of its receipt of two kinds of subsidies that are important (or even critical) to the budgets of many public libraries—grants under the Library Services and Technology Act, 20 U.S.C. § 9101 *et seq.* ("LSTA"), and so-called "E-rate discounts" for Internet access and support under the Telecommunications Act, 47 U.S.C. § 254. LSTA grant funds are awarded, *inter alia*, in order to: (1) assist libraries in accessing information through electronic networks, and (2) provide targeted library and information services to persons having difficulty using a library and to underserved and rural communities, including children from families with incomes below the poverty line. E-rate discounts serve the similar purpose of extending Internet access to schools and libraries in low- income communities. CIPA requires that libraries, in order to receive LSTA funds or E-rate discounts, certify that they are using a "technology protection measure" that prevents patrons from accessing "visual depictions" that are "obscene," "child pornography," or in the case of minors, "harmful to minors." 20 U.S.C. § 9134(f)(1)(A) (LSTA); 47 U.S.C. § 254(h)(6)(B) & (C) (E-rate).

The plaintiffs, a group of libraries, library associations, library patrons, and Web site publishers, brought this suit against the United States and others alleging that CIPA is facially unconstitutional because: (1) it induces public libraries to violate their patrons' First Amendment rights contrary to the requirements of *South Dakota v. Dole*, 483 U.S. 203, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987); and (2) it requires libraries to relinquish their First Amendment rights as a condition on the receipt of federal funds and is therefore impermissible under the doctrine of unconstitutional conditions. In arguing that CIPA will induce public libraries to violate the First Amendment, the plaintiffs contend that given the limits of the filtering technology, CIPA's conditions effectively require libraries to impose content-based restrictions on their patrons' access to constitutionally protected speech. According to the plaintiffs, these content-based restrictions are subject to strict scrutiny under public forum doctrine, see *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 837, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995), and are therefore permissible only if they are narrowly tailored to further a compelling state interest and no less restrictive alternatives would further that interest, see *Reno v. ACLU*, 521 U.S. 844, 874, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997).[1] The government responds

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[1] Plaintiffs advance three other alternative, independent grounds for holding CIPA facially invalid. First, they submit that even if CIPA will not induce public libraries to violate the First Amendment, CIPA nonetheless imposes an unconstitutional condition on public libraries by requiring them to relinquish their own First Amendment rights to provide unfiltered Internet access as a condition on their receipt of federal funds. *See infra* n. 36. Second, plaintiffs contend that CIPA is facially invalid because it effects an impermissible prior restraint on speech by granting filtering

that CIPA will not induce public libraries to violate the First Amendment, since it is possible for at least some public libraries to constitutionally comply with CIPA's conditions. Even if some libraries' use of filters might violate the First Amendment, the government submits that CIPA can be facially invalidated only if it is impossible for any public library to comply with its conditions without violating the First Amendment.

Pursuant to CIPA, a three-judge Court was convened to try the issues. Pub. L. No. 106-554. Following an intensive period of discovery on an expedited schedule to allow public libraries to know whether they need to certify compliance with CIPA by July 1, 2002, to receive subsidies for the upcoming year, the Court conducted an eight-day trial at which we heard 20 witnesses, and received numerous depositions, stipulations and documents. The principal focus of the trial was on the capacity of currently available filtering software. The plaintiffs adduced substantial evidence not only that filtering programs bar access to a substantial amount of speech on the Internet that is clearly constitutionally protected for adults and minors, but also that these programs are intrinsically unable to block only illegal Internet content while simultaneously allowing access to all protected speech.

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companies and library staff unfettered discretion to suppress speech before it has been received by library patrons and before it has been subject to a judicial determination that it is unprotected under the First Amendment. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975). Finally, plaintiffs submit that CIPA is unconstitutionally vague. *See City of Chicago v. Morales*, 527 U.S. 41, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999).

As our extensive findings of fact reflect, the plaintiffs demonstrated that thousands of Web pages containing protected speech are wrongly blocked by the four leading filtering programs, and these pages represent only a fraction of Web pages wrongly blocked by the programs. The plaintiffs' evidence explained that the problems faced by the manufacturers and vendors of filtering software are legion. The Web is extremely dynamic, with an estimated 1.5 million new pages added every day and the contents of existing Web pages changing very rapidly. The category lists maintained by the blocking programs are considered to be proprietary information, and hence are unavailable to customers or the general public for review, so that public libraries that select categories when implementing filtering software do not really know what they are blocking.

There are many reasons why filtering software suffers from extensive over-and underblocking, which we will explain below in great detail. They center on the limitations on filtering companies' ability to: (1) accurately collect Web pages that potentially fall into a blocked category (e.g., pornography); (2) review and categorize Web pages that they have collected; and (3) engage in regular re-review of Web pages that they have previously reviewed. These failures spring from constraints on the technology of automated classification systems, and the limitations inherent in human review, including error, misjudgment, and scarce resources, which we describe in detail *infra* at 58-74. One failure of critical importance is that the automated systems that filtering companies use to collect Web pages for classification are able to search only text, not images. This is crippling to filtering companies' ability

to collect pages containing "visual depictions" that are obscene, child pornography, or harmful to minors, as CIPA requires. As will appear, we find that it is currently impossible, given the Internet's size, rate of growth, rate of change, and architecture, and given the state of the art of automated classification systems, to develop a filter that neither underblocks nor overblocks a substantial amount of speech.

The government, while acknowledging that the filtering software is imperfect, maintains that it is nonetheless quite effective, and that it successfully blocks the vast majority of the Web pages that meet filtering companies' category definitions (e.g., pornography). The government contends that no more is required. In its view, so long as the filtering software selected by the libraries screens out the bulk of the Web pages proscribed by CIPA, the libraries have made a reasonable choice which suffices, under the applicable legal principles, to pass constitutional muster in the context of a facial challenge. Central to the government's position is the analogy it advances between Internet filtering and the initial decision of a library to determine which materials to purchase for its print collection. Public libraries have finite budgets and must make choices as to whether to purchase, for example, books on gardening or books on golf. Such content-based decisions, even the plaintiffs concede, are subject to rational basis review and not a stricter form of First Amendment scrutiny. In the government's view, the fact that the Internet reverses the acquisition process and requires the libraries to, in effect, purchase the entire Internet, some of which (e.g., hardcore pornography) it does not want, should not mean that it is

chargeable with censorship when it filters out offending material.

The legal context in which this extensive factual record is set is complex, implicating a number of constitutional doctrines, including the constitutional limitations on Congress's spending clause power, the unconstitutional conditions doctrine, and subsidiary to these issues, the First Amendment doctrines of prior restraint, vagueness, and overbreadth. There are a number of potential entry points into the analysis, but the most logical is the spending clause jurisprudence in which the seminal case is *South Dakota v. Dole*, 483 U.S. 203, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987). *Dole* outlines four categories of constraints on Congress's exercise of its power under the Spending Clause, but the only *Dole* condition disputed here is the fourth and last, i.e., whether CIPA requires libraries that receive LSTA funds or E-rate discounts to violate the constitutional rights of their patrons. As will appear, the question is not a simple one, and turns on the level of scrutiny applicable to a public library's content-based restrictions on patrons' Internet access. Whether such restrictions are subject to strict scrutiny, as plaintiffs contend, or only rational basis review, as the government contends, depends on public forum doctrine.

The government argues that, in providing Internet access, public libraries do not create a public forum, since public libraries may reserve the right to exclude certain speakers from availing themselves of the forum. Accordingly, the government contends that public libraries' restrictions on patrons' Internet access are subject only to rational basis review.

Plaintiffs respond that the government's ability to restrict speech on its own property, as in the case of

restrictions on Internet access in public libraries, is not unlimited, and that the more widely the state facilitates the dissemination of private speech in a given forum, the more vulnerable the state's decision is to restrict access to speech in that forum. We agree with the plaintiffs that public libraries' content-based restrictions on their patrons' Internet access are subject to strict scrutiny. In providing even filtered Internet access, public libraries create a public forum open to any speaker around the world to communicate with library patrons via the Internet on a virtually unlimited number of topics. Where the state provides access to a "vast democratic forum[ ]," *Reno v. ACLU*, 521 U.S. 844, 868, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997), open to any member of the public to speak on subjects "as diverse as human thought," *id.* at 870, 117 S. Ct. 2329 (internal quotation marks and citation omitted), the state's decision selectively to exclude from the forum speech whose content the state disfavors is subject to strict scrutiny, as such exclusions risk distorting the marketplace of ideas that the state has facilitated. Application of strict scrutiny finds further support in the extent to which public libraries' provision of Internet access uniquely promotes First Amendment values in a manner analogous to traditional public fora such as streets, sidewalks, and parks, in which content-based restrictions are always subject to strict scrutiny.

Under strict scrutiny, a public library's use of filtering software is permissible only if it is narrowly tailored to further a compelling government interest and no less restrictive alternative would serve that interest. We acknowledge that use of filtering software furthers public libraries' legitimate interests in preventing patrons from accessing visual depictions of

obscenity, child pornography, or in the case of minors, material harmful to minors. Moreover, use of filters also helps prevent patrons from being unwillingly exposed to patently offensive, sexually explicit content on the Internet.

We are sympathetic to the position of the government, believing that it would be desirable if there were a means to ensure that public library patrons could share in the informational bonanza of the Internet while being insulated from materials that meet CIPA's definitions, that is, visual depictions that are obscene, child pornography, or in the case of minors, harmful to minors. Unfortunately this outcome, devoutly to be wished, is not available in this less than best of all possible worlds. No category definition used by the blocking programs is identical to the legal definitions of obscenity, child pornography, or material harmful to minors, and, at all events, filtering programs fail to block access to a substantial amount of content on the Internet that falls into the categories defined by CIPA. As will appear, we credit the testimony of plaintiffs' expert Dr. Geoffrey Nunberg that the blocking software is (at least for the foreseeable future) incapable of effectively blocking the majority of materials in the categories defined by CIPA without overblocking a substantial amount of materials. Nunberg's analysis was supported by extensive record evidence. As noted above this inability to prevent both substantial amounts of underblocking and overblocking stems from several sources, including limitations on the technology that software filtering companies use to gather and review Web pages, limitations on resources for human review of Web pages, and the necessary error that results from human review processes.

Because the filtering software mandated by CIPA will block access to substantial amounts of constitutionally protected speech whose suppression serves no legitimate government interest, we are persuaded that a public library's use of software filters is not narrowly tailored to further any of these interests. Moreover, less restrictive alternatives exist that further the government's legitimate interest in preventing the dissemination of obscenity, child pornography, and material harmful to minors, and in preventing patrons from being unwillingly exposed to patently offensive, sexually explicit content. To prevent patrons from accessing visual depictions that are obscene and child pornography, public libraries may enforce Internet use policies that make clear to patrons that the library's Internet terminals may not be used to access illegal speech. Libraries may then impose penalties on patrons who violate these policies, ranging from a warning to notification of law enforcement, in the appropriate case. Less restrictive alternatives to filtering that further libraries' interest in preventing minors from exposure to visual depictions that are harmful to minors include requiring parental consent to or presence during unfiltered access, or restricting minors' unfiltered access to terminals within view of library staff. Finally, optional filtering, privacy screens, recessed monitors, and placement of unfiltered Internet terminals outside of sight-lines provide less restrictive alternatives for libraries to prevent patrons from being unwillingly exposed to sexually explicit content on the Internet.

In an effort to avoid the potentially fatal legal implications of the overblocking problem, the government falls back on the ability of the libraries, under CIPA's disabling provisions, see CIPA §1712 (codified at 20

U.S.C. § 9134(f)(3)), CIPA § 1721(b) (codified at 47 U.S.C. § 254(h)(6)(D)), to unblock a site that is patently proper yet improperly blocked. The evidence reflects that libraries can and do unblock the filters when a patron so requests. But it also reflects that requiring library patrons to ask for a Web site to be unblocked will deter many patrons because they are embarrassed, or desire to protect their privacy or remain anonymous. Moreover, the unblocking may take days, and may be unavailable, especially in branch libraries, which are often less well staffed than main libraries. Accordingly, CIPA's disabling provisions do not cure the constitutional deficiencies in public libraries' use of Internet filters.

Under these circumstances we are constrained to conclude that the library plaintiffs must prevail in their contention that CIPA requires them to violate the First Amendment rights of their patrons, and accordingly is facially invalid, even under the standard urged on us by the government, which would permit us to facially invalidate CIPA only if it is impossible for a single public library to comply with CIPA's conditions without violating the First Amendment. In view of the limitations inherent in the filtering technology mandated by CIPA, any public library that adheres to CIPA's conditions will necessarily restrict patrons' access to a substantial amount of protected speech, in violation of the First Amendment. Given this conclusion, we need not reach plaintiffs' arguments that CIPA effects a prior restraint on speech and is unconstitutionally vague. Nor do we decide their cognate unconstitutional conditions theory, though for reasons explained *infra* at note 36, we discuss the issues raised by that claim at some length.

For these reasons, we will enter an Order declaring Sections1712(a)(2) and 1721(b) of the Children's Internet Protection Act, codified at 20 U.S.C. § 9134(f) and 47 U.S.C. § 254(h)(6), respectively, to be facially invalid under the First Amendment and permanently enjoining the defendants from enforcing those provisions.

II. Findings of Fact

A. Statutory Framework

1. Nature and Operation of the E-rate and LSTA Programs

In the Telecommunications Act of 1996 ("1996 Act"), Congress directed the Federal Communications Commission ("FCC") to take the steps necessary to establish a system of support mechanisms to ensure the delivery of affordable telecommunications service to all Americans. This system, referred to as "universal service," is codified in section 254 of the Communications Act of 1934, as amended by the 1996 Act. *See* 47 U.S.C. § 254. Congress specified several groups as beneficiaries of the universal service support mechanism, including consumers in high-cost areas, low-income consumers, schools and libraries, and rural health care providers. *See* 47 U.S.C. § 254(h)(1). The extension of universal service to schools and libraries in section 254(h) is commonly referred to as the Schools and Libraries Program, or "E-rate" Program.

Under the E-rate Program, "[a]ll telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service . . ., provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties."

47 U.S.C. § 254(h)(1)(B). Under FCC regulations, providers of "interstate telecommunications" (with certain exceptions, *see* 47 C.F.R. § 54.706(d)), must contribute a portion of their revenue for disbursement among eligible carriers that are providing services to those groups or areas specified by Congress in section 254. To be eligible for the discounts, a library must: (1) be eligible for assistance from a State library administrative agency under the Library Services and Technology Act, *see infra*; (2) be funded as an independent entity, completely separate from any schools; and (3) not be operating as a for-profit business. *See* 47 C.F.R. § 54.501(c). Discounts on services for eligible libraries are set as a percentage of the pre-discount price, and range from 20% to 90%, depending on a library's level of economic disadvantage and its location in an urban or rural area. See 47 C.F.R. § 54.505. Currently, a library's level of economic disadvantage is based on the percentage of students eligible for the national school lunch program in the school district in which the library is located.

The Library Services and Technology Act ("LSTA"), Subchapter II of the Museum and Library Services Act, 20 U.S.C. § 9101 *et seq.*, was enacted by Congress in 1996 as part of the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208. The LSTA establishes three grant programs to achieve the goal of improving library services across the nation. Under the Grants to States Program, LSTA grant funds are awarded, *inter alia*, in order to assist libraries in accessing information through electronic networks and pay for the costs of acquiring or sharing computer systems and telecommunications technologies. See 20 U.S.C. § 9141(a). Through the Grants to States program, LSTA funds have been used to acquire and pay

costs associated with Internet-accessible computers located in libraries.

2. CIPA

The Children's Internet Protection Act ("CIPA") was enacted as part of the Consolidated Appropriations Act of 2001, which consolidated and enacted several appropriations bills, including the Miscellaneous Appropriations Act, of which CIPA was a part. *See* Pub. L. No. 106-554. CIPA addresses three distinct types of federal funding programs: (1) aid to elementary and secondary schools pursuant to Title III of the Elementary and Secondary Education Act of 1965, *see* CIPA § 1711 (amending Title 20 to add § 3601); (2) LSTA grants to states for support of libraries, *see* CIPA § 1712 (amending the Museum and Library Services Act, 20 U.S.C. § 9134); and (3) discounts under the E-rate program, *see* CIPA § 1721(a) & (b) (both amending the Communications Act of 1934, 47 U.S.C. § 254(h)). Only sections 1712 and 1721(b) of CIPA, which apply to libraries, are at issue in this case.

As explained in more detail below, CIPA requires libraries that participate in the LSTA and E-rate programs to certify that they are using software filters on their computers to protect against visual depictions that are obscene, child pornography, or in the case of minors, harmful to minors. CIPA permits library officials to disable the filters for patrons for bona fide research or other lawful purposes, but disabling is not permitted for minor patrons if the library receives E-rate discounts.

a. CIPA's Amendments to the E-rate Program

Section 1721(b) of CIPA imposes conditions on a library's participation in the E-rate program. A library

"having one or more computers with Internet access may not receive services at discount rates," CIPA § 1721(b) (codified at 47 U.S.C. § 254(h)(6)(A)(i)), unless the library certifies that it is "enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are—(I) obscene; (II) child pornography; or (III) harmful to minors," and that it is "enforcing the operation of such technology protection measure during any use of such computers by minors." CIPA § 1721(b) (codified at 47 U.S.C. § 254(h)(6)(B)).[2] CIPA defines a "technology

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[2] CIPA defines "[m]inor" as "any individual who has not attained the age of 17 years." CIPA § 1721(c) (codified at 47 U.S.C. § 254(h)(7)(D)). CIPA further provides that "[o]bscene" has the meaning given in 18 U.S.C. § 1460, and "child pornography" has the meaning given in 18 U.S.C. § 2256. CIPA § 1721(c) (codified at 47 U.S.C. § 254(h)(7)(E) & (F)). CIPA defines material that is "harmful to minors" as:

> any picture, image, graphic image file, or other visual depiction that—(i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion; (ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and (iii) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.

CIPA § 1721(c) (codified at 47 U.S.C. § 254(h)(7)(G)). CIPA prohibits federal interference in local determinations regarding what Internet content is appropriate for minors:

> A determination regarding what matter is appropriate for minors shall be made by the school board, local educational agency, library or other authority responsible for making the determination. No agency or instrumentality of the United States Gov-

protection measure" as "a specific technology that blocks or filters access to visual depictions that are obscene, . . . child pornography, . . . or harmful to minors." CIPA § 1703(b)(1) (codified at 47 U.S.C. § 254(h)(7)(I)).

To receive E-rate discounts, a library must also certify that filtering software is in operation during adult use of the Internet. More specifically, with respect to adults, a library must certify that it is "enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are—(I) obscene; or (II) child pornography," and that it is "enforcing the operation of such technology protection measure during any use of such computers." CIPA § 1721(b) (codified at 47 U.S.C. § 254(h)(6)(C)). Interpreting the statutory terms "any use," the FCC has concluded that "CIPA makes no distinction between computers used only by staff and those accessible to the public." *In re Federal State Joint Board on Universal Service: Children's Internet Protection Act*, CC Docket No. 96-45, Report and Order, FCC 01-120, ¶ 30 (Apr. 5, 2001).

With respect to libraries receiving E-rate discounts, CIPA further specifies that "[a]n administrator, supervisor, or other person authorized by the certifying authority . . . may disable the technology protection measure concerned, during use by an adult, to enable

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ernment may—(A) establish criteria for making such determination; (B) review the determination made by the certifying [entity] . . .; or (C) consider the criteria employed by the certifying [entity] . . . in the administration of subsection (h)(1)(B). CIPA §1732 (codified at 47 U.S.C. § 254(*l*)2)).

access for bona fide research or other lawful purpose." CIPA § 1721(b) (codified at 47 U.S.C. § 254(h)(6)(D)).

b. CIPA's Amendments to the LSTA Program

Section 1712 of CIPA amends the Museum and Library Services Act (20 U.S.C. § 9134(f)) to provide that no funds made available under the Act "may be used to purchase computers used to access the Internet, or to pay for direct costs associated with accessing the Internet," unless such library "has in place" and is enforcing "a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions" that are "obscene" or "child pornography," and, when the computers are in use by minors, also protects against access to visual depictions that are "harmful to minors." CIPA § 1712 (codified at 20 U.S.C. § 9134(f)(1)). Section 1712 contains definitions of "technology protection measure," "obscene," "child pornography," and "harmful to minors," that are substantially similar to those found in the provisions governing the E-rate program. CIPA § 1712 (codified at 20 U.S.C. § 9134(f)(7)); *see also supra* note 2.

As under the E-rate program, "an administrator, supervisor or other authority may disable a technology protection measure . . . to enable access for bona fide research or other lawful purposes." CIPA § 1712 (codified at 20 U.S.C. § 9134(f)(3)). Whereas CIPA's amendments to the E-rate program permit disabling for bona fide research or other lawful purposes only during adult use, the LSTA provision permits disabling for both adults and minors.

B. Identity of the Plaintiffs

1. Library and Library Association Plaintiffs

Plaintiffs American Library Association, Alaska Library Association, California Library Association, Connecticut Library Association, Freedom to Read Foundation, Maine Library Association, New England Library Association, New York Library Association, and Wisconsin Library Association are non-profit organizations whose members include public libraries that receive either E-rate discounts or LSTA funds for the provision of Internet access. Because it is a prerequisite to associational standing, we note that the interests that these organizations seek to protect in this litigation are central to their *raison d'être*.

Plaintiffs Fort Vancouver Regional Library District, in southwest Washington state; Multnomah County Public Library, in Multnomah County, Oregon; Norfolk Public Library System, in Norfolk, Virginia; Santa Cruz Public Library Joint Powers Authority, in Santa Cruz, California; South Central Library System ("SCLS"), centered in Madison, Wisconsin; and the Westchester Library System, in Westchester County, New York, are public library systems with branch offices in their respective localities that provide Internet access to their patrons.

The Fort Vancouver Regional Library District, for over three years from 1999-2001, received $135,000 in LSTA grants and $19,500 in E-rate discounts for Internet access. The Multnomah County Public Library received $70,000 in E-rate discounts for Internet access this year, and has applied for $100,000 in E-rate discounts for the upcoming year. The Norfolk Public Library System received $90,000 in E-rate discounts

for Internet access this year, and has received a $200,000 LSTA grant to put computer labs in eight of its libraries. The Santa Cruz Public Library Joint Powers Authority received $20,560 in E-rate discounts for Internet access in 2001-02. The SCLS received between $3,000 and $5,000 this year in E-rate discounts for Internet access.

The Fort Vancouver Regional Library District Board is a public board whose members are appointed by elected county commissioners. The Multnomah County Library is a county department, whose board is appointed by the county chair and confirmed by the other commissioners. The SCLS is an aggregation of 51 independently governed statutory member public libraries, whose relationship to SCLS is defined by state law. The governing body of the SCLS is the Library Board of Trustees, which consists of 20 members nominated by county executives and ratified by county boards of supervisors.

2. Patron and Patron Association Plaintiffs

Plaintiffs Association of Community Organizations for Reform Now, Friends of the Philadelphia City Institute Library, and the Pennsylvania Alliance for Democracy are nonprofit organizations whose members include individuals who access the Internet at public libraries that receive E-rate discounts or LSTA funds for the provision of public Internet access. We note for the purpose of associational standing that the interests that these organizations seek to protect in this litigation are germane to their purposes.

Plaintiffs Emmalyn Rood, Mark Brown, Elizabeth Hrenda, C. Donald Weinberg, Sherron Dixon, by her father and next friend Gordon Dixon, James Geringer,

Marnique Tynesha Overby, by her next friend Carolyn C. Williams, William J. Rosenbaum, Carolyn C. Williams, and Quiana Williams, by her mother and next friend Sharon Bernard, are adults and minors who use the Internet at public libraries that, to the best of their knowledge, do not filter patrons' access to the Internet. Several of these plaintiffs do not have Internet access from home.

Emmalyn Rood is a sixteen-year-old who uses the Multnomah County Public Library. When she was 13, she used the Internet at the Multnomah County Public Library to research issues relating to her sexual identity. Ms. Rood did not use her home or school computer for this research, in part because she wished her searching to be private. Although the library offered patrons the option of using filtering software, Ms. Rood did not use that option because she had had previous experience with such programs blocking information that was valuable to her, including information relating to gay and lesbian issues.

Plaintiff Mark Brown used the Internet at the Philadelphia Free Library to research breast cancer and reconstructive surgery for his mother who had breast surgery. Mr. Brown's research at the library provided him and his mother with essential information about his mother's medical condition and potential treatments.

3. Web Publisher Plaintiffs

Plaintiff Afraid to Ask, Inc., based in Saunderstown, Rhode Island, publishes a health education Web site, www.AfraidtoAsk.com. Dr. Jonathan Bertman, the president and medical director of Afraid to Ask, is a family practice physician in rural Rhode Island and a

clinical assistant professor of family medicine at Brown University. Afraid to Ask.com's mission is to provide detailed information on sensitive health issues, often of a sexual nature, such as sexually transmitted diseases, male and female genitalia, and birth control, sought by people of all ages who would prefer to learn about sensitive health issues anonymously, i.e., they are "afraid to ask." As part of its educational mission, Afraidto Ask.com often uses graphic images of sexual anatomy to convey information. Its primary audience is teens and young adults. Based on survey data collected on the site, half of the people visiting the site are under 24 years old and a quarter are under 18. AfraidtoAsk.com is blocked by several leading blocking products as containing sexually explicit content.

Plaintiff Alan Guttmacher Institute has a Web site that contains information about its activities and objectives, including its mission to protect the reproductive choices of women and men. Plaintiff Planned Parenthood Federation of America, Inc. ("Planned Parenthood") is a national voluntary organization in the field of reproductive health care. Planned Parenthood owns and operates several Web sites that provide a range of information about reproductive health, from contraception to prevention of sexually transmitted diseases, to finding an abortion provider, and to information about the drug Mifepristone. Plaintiff Safersex.org is a Web site that offers free educational information on how to practice safer sex.

Plaintiff Ethan Interactive, Inc., d/b/a Out In America, is an online content provider that owns and operates 64 free Web sites for gay, lesbian, bisexual and transgendered persons worldwide. Plaintiff PlanetOut Corporation is an online content provider for gay,

lesbian, bisexual and transgendered persons. Plaintiff the Naturist Action Committee ("NAC") is the non-profit political arm of the Naturist Society, a private organization that promotes a way of life characterized by the practice of nudity. The NAC Web site provides information about Naturist Society activities and about state and local laws that may affect the rights of Naturists or their ability to practice Naturism, and includes nude photographs of its members.

Plaintiff Wayne L. Parker was the Libertarian candidate in the 2000 U.S. Congressional election for the Fifth District of Mississippi (and is running again in 2002). He publishes a Web site that communicates information about his campaign and that provides information about his political views and the Libertarian Party to the public. Plaintiff Jeffrey Pollock was the Republican candidate in the 2000 U.S. Congressional election for the Third District of Oregon. He operates a Web site that is now promoting his candidacy for Congress in 2002.[3]

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[3] The government challenges the standing of several of the plaintiffs and the ripeness of their claims. These include all of the Web site publishers and all of the individual library patrons. Notwithstanding these objections, we are confident that the "case or controversy" requirement of Article III, § 2 of the Constitution is met by the existence of the plaintiff libraries that qualify for LSTA and E-rate funding and the library associations whose members qualify for such funding. These plaintiffs are faced with the impending choice of either certifying compliance with CIPA by July 1, 2002, or foregoing subsidies under the LSTA and E-rate programs, and therefore clearly have standing to challenge the constitutionality of the conditions to which they will be subject should they accept the subsidies. We also note that the presence of the Web site publishers and individual library patrons does not affect our legal analysis or disposition of the case.

C. The Internet

1. Background

As we noted at the outset, the Internet is a vast, interactive medium consisting of a decentralized network of computers around the world. The Internet presents low entry barriers to anyone who wishes to provide or distribute information. Unlike television, cable, radio, newspapers, magazines or books, the Internet provides an opportunity for those with access to it to communicate with a worldwide audience at little cost. At least 400 million people use the Internet worldwide, and approximately 143 million Americans were using the Internet as of September 2001. Nat'l Telecomm.& Info. Admin., *A Nation Online: How Americans Are Expanding Their Use of the Internet* (February 2002), *available at http://www.ntia.doc.gov/ntiahome/dn/.*

The World Wide Web is a part of the Internet that consists of a network of computers, called "Web servers," that host "pages" of content accessible via the Hypertext Transfer Protocol or "HTTP." Anyone with a computer connected to the Internet can search for and retrieve information stored on Web servers located around the world. Computer users typically access the Web by running a program called a "browser" on their computers. The browser displays, as individual pages on the computer screen, the various types of content found on the Web and lets the user follow the connections built into Web pages—called "hypertext links," "hyperlinks," or "links"—to additional content. Two popular browsers are Microsoft Internet Explorer and Netscape Navigator.

A "Web page" is one or more files a browser graphically assembles to make a viewable whole when a user requests content over the Internet. A Web page may contain a variety of different elements, including text, images, buttons, form fields that the user can fill in, and links to other Web pages. A "Web site" is a term that can be used in several different ways. It may refer to all of the pages and resources available on a particular Web server. It may also refer to all the pages and resources associated with a particular organization, company or person, even if these are located on different servers, or in a subdirectory on a single server shared with other, unrelated sites. Typically, a Web site has as an intended point of entry, a "home page," which includes links to other pages on the same Web site or to pages on other sites. Online discussion groups and chat rooms relating to a variety of subjects are available through many Web sites.

Users may find content on the Web using engines that search for requested keywords. In response to a keyword request, a search engine will display a list of Web sites that may contain relevant content and provide links to those sites. Search engines and directories often return a limited number of sites in their search results (e.g., the Google search engine will return only 2,000 sites in response to a search, even if it has found, for example, 530,000 sites in its index that meet the search criteria).

A user may also access content on the Web by typing a URL (Uniform Resource Locator) into the address line of the browser. A URL is an address that points to some resource located on a Web server that is accessible over the Internet. This resource may be a Web site, a Web page, an image, a sound or video file, or other

resource. A URL can be either a numeric Internet Protocol or "IP" address, or an alphanumeric "domain name" address. Every Web server connected to the Internet is assigned an IP address. A typical IP address looks like "13.1.64.14." Typing the URL "*http://13.1.64.14 /*" into a browser will bring the user to the Web server that corresponds to that address. For convenience, most Web servers have alphanumeric domain name addresses in addition to IP addresses. For example, typing in "*http://www.paed.uscourts.gov*" will bring the user to the same Web server as typing in "*http://204.170.64.143.*"

Every time a user attempts to access material located on a Web server by entering a domain name address into a Web browser, a request is made to a Domain Name Server, which is a directory of domain names and IP addresses, to "resolve," or translate, the domain name address into an IP address. That IP address is then used to locate the Web server from docile which content is being requested. A Web site may be accessed by using either its domain name address or its IP address.

A domain name address typically consists of several parts. For example, the alphanumeric URL *http://www.paed.uscourts.gov/documents/opinions* can be broken down into three parts. The first part is the transfer protocol the computer will use in accessing the content (e.g., "http" for Hypertext Transfer Protocol); next is the name of the host server on which the information is stored (e.g., *www.paed.uscourts.gov*); and then the name of the particular file or directory on that server (e.g., */documents/opinions*).

A single Web page may be associated with more than one URL. For example, the URLs *http://www.new*

yorktimes.com and *http://www.nytimes.com* will both take the user to the *New York Times* home page. The topmost directory in a Web site is often referred to as that Web site's root directory or root URL. For example, in *http://www.paed.uscourts.gov/documents*, the root URL is *http:// www.paed.uscourts.gov*. There may be hundreds or thousands of pages under a single root URL, or there may be one or only a few.

There are a number of Web hosting companies that maintain Web sites for other businesses and individuals, which can lead to vast amounts of diverse content being located at the same IP address. Hosting services are offered either for a fee, or in some cases, for free, allowing any individual with Internet access to create a Web site. Some hosting services are provided through the process of "IP-based hosting," where each domain name is assigned a unique IP number. For example, *www.baseball.com* might map to the IP address "10.3.5.9" and *www.XXX.com* might map to the IP address "10.0.42.5." Other hosting services are provided through the process of "name-based hosting," where multiple domain name addresses are mapped to a single IP address. If the hosting company were using this method, both *www.baseball.com* and *www.XXX.com* could map to a single IP address, e.g., "10.3.5.9." As a result of the "name-based hosting" process, up to tens of thousands of pages with heterogeneous content may share a single IP address.

2. The Indexable Web, the "Deep Web"; Their Size and Rates of Growth and Change

The universe of content on the Web that could be indexed, in theory, by standard search engines is known as the "publicly indexable Web." The publicly indexable Web is limited to those pages that are

accessible by following a link from another Web page that is recognized by a search engine. This limitation exists because online indexing techniques used by popular search engines and directories such as Yahoo, Lycos and AltaVista, are based on "spidering" technology, which finds sites to index by following links from site to site in a continuous search for new content. If a Web page or site is not linked by others, then spidering will not discover that page or site.

Furthermore, many larger Web sites contain instructions, through software, that prevent spiders from investigating that site, and therefore the contents of such sites also cannot be indexed using spidering technology. Because of the vast size and decentralized structure of the Web, no search engine or directory indexes all of the content on the publicly indexable Web. We credit current estimates that no more than 50% of the content currently on the publicly indexable Web has been indexed by all search engines and directories combined. No currently available method or combination of methods for collecting URLs can collect the addresses of all URLs on the Web.

The portion of the Web that is not theoretically indexable through the use of "spidering" technology, because other Web pages do not link to it, is called the "Deep Web." Such sites or pages can still be made publicly accessible without being made publicly indexable by, for example, using individual or mass emailings (also known as "spam") to distribute the URL to potential readers or customers, or by using types of Web links that cannot be found by spiders but can be seen and used by readers. "Spamming" is a common method of distributing to potential customers links to sexually explicit content that is not indexable.

Because the Web is decentralized, it is impossible to say exactly how large it is. A 2000 study estimated a total of 7.1 million unique Web sites, which at the Web's historical rate of growth, would have increased to 11 million unique sites as of September 2001. Estimates of the total number of Web pages vary, but a figure of 2 billion is a reasonable estimate of the number of Web pages that can be reached, in theory, by standard search engines. We need not make a specific finding as to a figure, for by any measure the Web is extremely vast, and it is constantly growing. The indexable Web is growing at a rate of approximately 1.5 million pages per day. The size of the un-indexable Web, or the "Deep Web," while impossible to determine precisely, is estimated to be two to ten times that of the publicly indexable Web.

In addition to growing rapidly, Web pages and sites are constantly being removed, or changing their content. Web sites or pages can change content without changing their domain name addresses or IP addresses. Individual Web pages have an average life span of approximately 90 days.

3. The Amount of Sexually Explicit Material on the Web

There is a vast amount of sexually explicit material available via the Internet and the Web. Sexually explicit material on the Internet is easy to access using any public search engine, such as, for example, Google or AltaVista. Although much of the sexually explicit material available on the Web is posted on commercial sites that require viewers to pay in order to gain access to the site, a large number of sexually explicit sites may be accessed for free and without providing any registration information. Most importantly, some Web sites that contain sexually explicit content have innocuous domain names and therefore can be reached accidentally. A commonly cited example is *http://www. whitehouse.com.* Other innocent-sounding URLs that retrieve graphic, sexually explicit depictions include *http://www.boys.com, http://www.girls.com, http:// www. coffeebeansupply.com,* and http://www.Bookstore*USA.com.* Moreover, commercial Web sites that contain sexually explicit material often use a technique of attaching pop-up windows to their sites, which open new windows advertising other sexually explicit sites without any prompting by the user. This technique makes it difficult for a user quickly to exit all of the pages containing sexually explicit material, whether he or she initially accessed such material intentionally or not.

The percentage of Web pages on the indexed Web containing sexually explicit content is relatively small. Recent estimates indicate that no more than 1-2% of the content on the Web is pornographic or sexually explicit. However, the absolute number of Web sites offering free sexually explicit material is extremely large, approximately 100,000 sites.

D. American Public Libraries

The more than 9,000 public libraries in the United States are typically funded (at least in large part) by state or local governments. They are frequently overseen by a board of directors that is either elected or is appointed by an elected official or a body of elected officials. We heard testimony from librarians and library board members working in eight public library systems in different communities across the country, some of whom are also plaintiffs in this case. They

hailed from the following library systems: Fort Vancouver, Washington; Fulton County, Indiana; Greenville, South Carolina; a regional consortium of libraries centered in Madison, Wisconsin; Multnomah County, Oregon; Norfolk, Virginia; Tacoma, Washington; and Westerville, Ohio. The parties also took depositions from several other librarians and library board members who did not testify during the trial, and submitted a number of other documents regarding individual libraries' policies.

1. The Mission of Public Libraries, and Their Reference and Collection Development Practices

American public libraries operate in a wide variety of communities, and it is not surprising that they do not all view their mission identically. Nor are their practices uniform. Nevertheless, they generally share a common mission—to provide patrons with a wide range of information and ideas.

Public libraries across the country have endorsed the American Library Association's ("ALA") "Library Bill of Rights" and/or "Freedom to Read Statement," including every library testifying on behalf of the defendants in this case. The "Library Bill of Rights," first adopted by the ALA in 1948, provides, among other things, that "[b]ooks and other library resources should be provided for the interest, information, and enlightenment of all people of the community the library serves." It also states that libraries "should provide materials and information presenting all points of view on current and historical issues" and that library materials "should not be proscribed or removed because of partisan or doctrinal disapproval."

The ALA's "Freedom to Read" statement, adopted in 1953 and most recently updated in July 2000, states, among other things, that "[i]t is in the public interest for publishers and librarians to make available the widest diversity of views and expressions, including those that are unorthodox or unpopular with the majority." It also states that "[i]t is the responsibility of . . . librarians . . . to contest encroachments upon th[e] freedom [to read] by individuals or groups seeking to impose their own standards or tastes upon the community at large."

Public libraries provide information not only for educational purposes, but also for recreational, professional, and other purposes. For example, Ginnie Cooper, Director of the Multnomah County Library, testified that some of the library's most popular items include video tapes of the British Broadcasting Corporation's "Fawlty Towers" series, and also print and "books on tape" versions of science fiction, romance, and mystery novels. Many public libraries include sexually explicit materials in their print collection, such as *The Joy of Sex* and *The Joy of Gay Sex*. Very few public libraries, however, collect more graphic sexually explicit materials, such as XXX-rated videos, or *Hustler* magazine. [4]

The mission of public librarians is to provide their patrons with a wide array of information, and they surely do so. Reference librarians across America

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[4] The OCLC database, a cooperative cataloging service established to facilitate interlibrary loan requests, includes 40 million catalog records from approximately 48,000 libraries of all types worldwide. Slightly more than 400 of the libraries in the OCLC database are listed as carrying *Playboy* in their collections, while only eight subscribe to *Hustler*.

answer more than 7 million questions weekly. If a patron has a specialized need for information not available in the public library, the professional librarian will use a reference interview to find out what information is needed to help the user, including the purpose for which an item will be used. Reference librarians are trained to assist patrons without judging the patron's purpose in seeking information, or the content of the information that the patron is seeking.

Many public libraries routinely provide patrons with access to materials not in their collections through the use of bibliographic access tools and interlibrary loan programs. Public libraries typically will assist patrons in obtaining access to all materials except those that are illegal, even if they do not collect those materials in their physical collection. In order to provide this access, a librarian may attempt to find material not included in the library's own collection in other libraries in the system, through interlibrary loan, or through a referral, perhaps to a government agency or a commercial bookstore. Interlibrary loan is expensive, however, and is therefore used infrequently.

Public librarians also apply professional standards to their collection development practices. Public libraries generally make material selection decisions and frame policies governing collection development at the local level. Collection development is a key subject in the curricula of Masters of Library Science programs and is defined by certain practices. In general, professional standards guide public librarians to build, develop and create collections that have certain characteristics, such as balance in its coverage and requisite and appropriate quality. To this end, the goal of library collections is not universal coverage, but rather to find those materials

that would be of the greatest direct benefit or interest to the community. In making selection decisions, librarians consider criteria including the content of the material, its accuracy, the title's niche in relation to the rest of the collection, the authority of the author, the publisher, the work's presentation, and how it compares with other material available in the same genre or on the same subject.

In pursuing the goal of achieving a balanced collection that serves the needs and interests of their patrons, librarians generally have a fair amount of autonomy, but may also be guided by a library's collection development policy. These collection development policies are often drawn up in conjunction with the libraries' governing boards and with representatives from the community, and may be the result of public hearings, discussions and other input.

Although many librarians use selection aids, such as review journals and bibliographies, as a guide to the quality of potential acquisitions, they do not generally delegate their selection decisions to parties outside of the public library or its governing body. One limited exception is the use of third-party vendors or approval plans to acquire print and video resources. In such arrangements, third-party vendors provide materials based on the library's description of its collection development criteria. The vendor sends materials to the library, and the library retains the materials that meet its collection development needs and returns the materials that do not. Even in this arrangement, however, the librarians still retain ultimate control over their collection development and review all of the materials that enter their library's collection.

2. The Internet in Public Libraries

The vast majority of public libraries offer Internet access to their patrons. According to a recent report by the U.S. National Commission on Libraries and Information Science, approximately 95% of all public libraries provide public access to the Internet. John C. Bertot & Charles R. McClure, *Public Libraries and the Internet 2000: Summary Findings and Data Tables*, Report to National Commission on Libraries and Information Science, at 3. The Internet vastly expands the amount of information available to patrons of public libraries. The widespread availability of Internet access in public libraries is due, in part, to the availability of public funding, including state and local funding and the federal funding programs regulated by CIPA.

Many libraries face a large amount of patron demand for their Internet services. At some libraries, patron demand for Internet access during a given day exceeds the supply of computer terminals with access to the Internet. These libraries use sign-in and time limit procedures and/or establish rules regarding the allowable uses of the terminals, in an effort to ration their computer resources. For example, some of the libraries whose librarians testified at trial prohibit the use of email and chat functions on their public Internet terminals.

Public libraries play an important role in providing Internet access to citizens who would not otherwise possess it. Of the 143 million Americans using the Internet, approximately 10%, or 14.3 million people, access the Internet at a public library. Internet access at public libraries is more often used by those with lower incomes than those with higher incomes. About 20.3% of Internet users with household family income of

less than $15,000 per year use public libraries for Internet access. Approximately 70% of libraries serving communities with poverty levels in excess of 40% receive E-rate discounts.

a. Internet Use Policies in Public Libraries

Approximately 95% of libraries with public Internet access have some form of "acceptable use" policy or "Internet use" policy governing patrons' use of the Internet. These policies set forth the conditions under which patrons are permitted to access and use the library's Internet resources. These policies vary widely. Some of the less restrictive policies, like those held by Multnomah County Library and Fort Vancouver Regional Library, do not prohibit adult patrons from viewing sexually explicit materials on the Web, as long as they do so at terminals with privacy screens or recessed monitors, which are designed to prevent other patrons from seeing the material that they are viewing, and as long as it does not violate state or federal law to do so. Other libraries prohibit their patrons from viewing all "sexually explicit" or "sexually graphic" materials.

Some libraries prohibit the viewing of materials that are not necessarily sexual, such as Web pages that are "harmful to minors," "offensive to the public," "objectionable," "racially offensive," or simply "inappropriate." Other libraries restrict access to Web sites that the library just does not want to provide, even though the sites are not necessarily offensive. For example, the Fulton County Public Library restricts access to the Web sites of dating services. Similarly, the Tacoma Public Library's policy does not allow patrons to use

the library's Internet terminals for personal email, for online chat, or for playing games.

In some cases, libraries instituted Internet use policies after having experienced specific problems, whereas in other cases, libraries developed detailed Internet use policies and regulatory measures (such as using filtering software) before ever offering public Internet access. Essentially four interests motivate libraries to institute Internet use policies and to apply the methods described above to regulate their patrons' use of the Internet.

First, libraries have sought to protect patrons (especially children) and staff members from accidentally viewing sexually explicit images, or other Web pages containing content deemed harmful, that other patrons are viewing on the Internet. For example, some librarians who testified described situations in which patrons left sexually explicit images minimized on an Internet terminal so that the next patron would see them when they began using it, or in which patrons printed sexually explicit images from a Web site and left them at a public printer.

Second, libraries have attempted to protect patrons from unwittingly or accidentally accessing Web pages that they do not wish to see while they are using the Internet. For example, the Memphis Shelby County (Tennessee) Public Library's Internet use policy states that the library "employs filtering technology to reduce the possibility that customers may encounter objectionable content in the form of depictions of full nudity and sexual acts."

Third, libraries have sought to keep patrons (again, especially children) from intentionally accessing sexu-

ally explicit materials or other materials that the library deems inappropriate. For example, a study of the Tacoma Public Library's Internet use logs for the year 2000 showed that users between the ages of 11 and 15 accounted for 41% of the filter blocks that occurred on library computers. The study, which we credit, concluded that children and young teens were actively seeking to access sexually explicit images in the library. The Greenville Library's Board of Directors was particularly concerned that patrons were accessing obscene materials in the public library in violation of South Carolina's obscenity statute.

Finally, some libraries have regulated patrons' Internet use to attempt to control patrons' inappropriate (or illegal) behavior that is thought to stem from viewing Web pages that contain sexually explicit materials or content that is otherwise deemed unacceptable.

We recognize the concerns that led several of the public libraries whose librarians and board members testified in this case to start using Internet filtering software. The testimony of the Chairman of the Board of the Greenville Public Library is illustrative. In December 1999, there was considerable local press coverage in Greenville concerning adult patrons who routinely used the library to surf the Web for pornography. In response to public outcry stemming from the newspaper report, the Board of Trustees held a special board meeting to obtain information and to communicate with the public concerning the library's provision of Internet access. At this meeting, the Board learned for the first time of complaints about children being exposed to pornography that was displayed on the library's Internet terminals.

In late January to early February of 2000, the library installed privacy screens and recessed terminals in an effort to restrict the display of sexually explicit Web sites at the library. In February, 2000, the Board informed the library staff that they were expected to be familiar with the South Carolina obscenity statute and to enforce the policy prohibition on access to obscene materials, child pornography, or other materials prohibited under applicable local, state, and federal laws. Staff were told that they were to enforce the policy by means of a "tap on the shoulder." Prior to adopting its current Internet Use Policy, the Board adopted an "Addendum to Current Internet Use Policy." Under the policy, the Board temporarily instituted a two-hour time limit per day for Internet use; reduced substantially the number of computers with Internet access in the library; reconfigured the location of the computers so that librarians had visual contact with all Internet- accessible terminals; and removed the privacy screens from terminals with Internet access.

Even after the Board implemented the privacy screens and later the "tap-on-the-shoulder" policy combined with placing terminals in view of librarians, the library experienced a high turnover rate among reference librarians who worked in view of Internet terminals. Finding that the policies that it had tried did not prevent the viewing of sexually explicit materials in the library, the Board at one point considered discontinuing Internet access in the library. The Board finally concluded that the methods that it had used to regulate Internet use were not sufficient to stem the behavioral problems that it thought were linked to the availability of pornographic materials in the library. As a result, it implemented a mandatory filtering policy.

We note, however, that none of the libraries proffered by the defendants presented any systematic records or quantitative comparison of the amount of criminal or otherwise inappropriate behavior that occurred in their libraries before they began using Internet filtering software compared to the amount that happened after they installed the software. The plaintiffs' witnesses also testified that because public libraries are public places, incidents involving inappropriate behavior in libraries (sexual and otherwise) existed long before libraries provided access to the Internet.

b. Methods for Regulating Internet Use

The methods that public libraries use to regulate Internet use vary greatly. They can be organized into four categories: (1) channeling patrons' Internet use; (2) separating patrons so that they will not see what other patrons are viewing; (3) placing Internet terminals in public view and having librarians observe patrons to make sure that they are complying with the library's Internet use policy; and (4) using Internet filtering software.

The first category—channeling patrons' Internet use—frequently includes offering training to patrons on how to use the Internet, including how to access the information that they want and to avoid the materials that they do not want. Another technique that some public libraries use to direct their patrons to pages that the libraries have determined to be accurate and valuable is to establish links to "recommended Web sites" from the public library's home page (i.e., the page that appears when patrons begin a session at one of the library's public Internet terminals). Librarians select these recommended Web sites by using criteria similar to those employed in traditional collection development.

However, unless the library determines otherwise, selection of these specific sites does not preclude patrons from attempting to access other Internet Web sites.

Libraries may extend the "recommended Web sites" method further by limiting patrons' access to only those Web sites that are reviewed and selected by the library's staff. For example, in 1996, the Westerville, Ohio Library offered Internet access to children through a service called the "Library Channel." This service was intended to be a means by which the library could organize the Internet in some fashion for presentation to patrons. Through the Library Channel, the computers in the children's section of the library were restricted to 2,000 to 3,000 sites selected by librarians. After three years, Westerville stopped using the Library Channel system because it overly constrained the children's ability to access materials on the Internet, and because the library experienced several technical problems with the system.

Public libraries also use several different techniques to separate patrons during Internet sessions so that they will not see what other patrons are viewing. The simplest way to achieve this result is to position the library's public Internet terminals so that they are located away from traffic patterns in the library (and from other terminals), for example, by placing them so that they face a wall. This method is obviously constrained by libraries' space limitations and physical layout. Some libraries have also installed privacy screens on their public Internet terminals. These screens make a monitor appear blank unless the viewer

is looking at it head-on.[5] Although the Multnomah and Fort Vancouver Libraries submitted records showing that they have received few complaints regarding patrons' unwilling exposure to materials on the Internet, privacy screens do not always prevent library patrons or employees from inadvertently seeing the materials that another patron is viewing when passing directly behind a terminal. They also have the drawback of making it difficult for patrons to work together at a single terminal, or for librarians to assist patrons at terminals, because it is difficult for two people to stand side by side and view a screen at the same time. Some library patrons also find privacy screens to be a hindrance and have attempted to remove them in order to improve the brightness of the screen or to make the view better.

Another method that libraries use to prevent patrons from seeing what other patrons are viewing on their terminals is the installation of "recessed monitors." Recessed monitors are computer screens that sit below the level of a desk top and are viewed from above. Although recessed monitors, especially when combined with privacy screens, eliminate almost all of the possibility of a patron accidentally viewing the contents on another patron's screen, they suffer from the same drawbacks as privacy screens, that is, they make it

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[5] Fort Vancouver Regional Library, for example, combines the methods of strategically placing terminals in low traffic areas and using privacy screens. A section headed "Confidentiality and Privacy" on the library's home page states: "in order to protect the privacy of the user and the interests of other library patrons, the library will attempt to minimize unintentional viewing of the Internet. This will be done by use of privacy screens, and by judicious placement of the terminals and other appropriate means."

difficult for patrons to work together or with a librarian at a single terminal. Some librarians also testified that recessed monitors are costly, but did not indicate how expensive they are compared to privacy screens or filtering software. A related technique that some public libraries use is to create a separate children's Internet viewing area, where no adults except those accompanying children in their care may use the Internet terminals. This serves the objective of keeping children from inadvertently viewing materials appropriate only for adults that adults may be viewing on nearby terminals.

A third set of techniques that public libraries have used to enforce their Internet use policies takes the opposite tack from the privacy screens/recessed monitors approach by placing all of the library's public Internet terminals in prominent and visible locations, such as near the library's reference desk. This approach allows librarians to enforce their library's Internet use policy by observing what patrons are viewing and employing the tap-on-the-shoulder policy. Under this approach, when patrons are viewing materials that are inconsistent with the library's policies, a library staff member approaches them and asks them to view something else, or may ask them to end their Internet session. A patron who does not comply with these requests, or who repeatedly views materials not permitted under the library's Internet use policy, may have his or her Internet or library privileges suspended or revoked. But many librarians are uncomfortable with approaching patrons who are viewing sexually explicit images, finding confrontation unpleasant. Hence some libraries are reluctant to apply the tap-on-the-shoulder policy.

The fourth category of methods that public libraries employ to enforce their Internet use policies, and the one that gives rise to this case, is the use of Internet filtering software. According to the June 2000 *Survey of Internet Access Management in Public Libraries*, approximately 7% of libraries with public Internet access had mandated the use of blocking programs by adult patrons. Some public libraries provide patrons with the option of using a blocking program, allowing patrons to decide whether to engage the program when they or their children access the Internet. Other public libraries require their child patrons to use filtering software, but not their adult patrons.

Filtering software vendors sell their products on a subscription basis. The cost of a subscription varies with the number of computers on which the filtering software will be used. In 2001, the cost of the Cyber Patrol filtering software was $1,950 for 100 terminal licenses. The Greenville County Library System pays $2,500 per year for the N2H2 filtering software, and a subscription to the Websense filter costs Westerville Public Library approximately $1,200 per year.

No evidence was presented on the cost of privacy screens, recessed monitors, and the tap-on-the-shoulder policy, relative to the costs of filtering software. Nor did any of the libraries proffered by the government present any quantitative evidence on the relative effectiveness of use of privacy screens to prevent patrons from being unwillingly exposed to sexually explicit material, and the use of filters, discussed below. No evidence was presented, for example, comparing the number of patron complaints in those libraries that have tried both methods.

The librarians who testified at trial whose libraries use Internet filtering software all provide methods by which their patrons may ask the library to unblock specific Web sites or pages. Of these, only the Tacoma Public Library allows patrons to request that a URL be unblocked without providing any identifying information; Tacoma allows patrons to request a URL by sending an email from the Internet terminal that the patron is using that does not contain a return email address for the user. David Biek, the head librarian at the Tacoma Library's main branch, testified at trial that the library keeps records that would enable it to know which patrons made unblocking requests, but does not use that information to connect users with their requests. Biek also testified that he periodically scans the library's Internet use logs to search for: (1) URLs that were erroneously blocked, so that he may unblock them; or (2) URLs that should have been blocked, but were not, in order to add them to a blocked category list. In the course of scanning the use logs, Biek has also found what looked like attempts to access child pornography. In two cases, he communicated his findings to law enforcement and turned over the logs in response to a subpoena.

At all events, it takes time for librarians to make decisions about whether to honor patrons' requests to unblock Web pages. In the libraries proffered by the defendants, unblocking decisions sometimes take between 24 hours and a week. Moreover, none of these libraries allows unrestricted access to the Internet pending a determination of the validity of a Web site blocked by the blocking programs. A few of the defendants' proffered libraries represented that individual librarians would have the discretion to allow a patron to

have full Internet access on a staff computer upon request, but none claimed that allowing such access was mandatory, and patron access is supervised in every instance. None of these libraries makes differential unblocking decisions based on the patrons' age. Unblocking decisions are usually made identically for adults and minors. Unblocking decisions even for adults are usually based on suitability of the Web site for minors.

It is apparent that many patrons are reluctant or unwilling to ask librarians to unblock Web pages or sites that contain only materials that might be deemed personal or embarrassing, even if they are not sexually explicit or pornographic. We credit the testimony of Emmalyn Rood, discussed above, that she would have been unwilling as a young teen to ask a librarian to disable filtering software so that she could view materials concerning gay and lesbian issues. We also credit the testimony of Mark Brown, who stated that he would have been too embarrassed to ask a librarian to disable filtering software if it had impeded his ability to research treatments and cosmetic surgery options for his mother when she was diagnosed with breast cancer.

The pattern of patron requests to unblock specific URLs in the various libraries involved in this case also confirms our finding that patrons are largely unwilling to make unblocking requests unless they are permitted to do so anonymously. For example, the Fulton County Library receives only about 6 unblocking requests each year, the Greenville Public Library has received only 28 unblocking requests since August 21, 2000, and the Westerville, Ohio Library has received fewer than 10 unblocking requests since 1999. In light of the fact that a substantial amount of overblocking occurs in the-

severy libraries, *see infra* Subsection II.E.4, we find that the lack of unblocking requests in these libraries does not reflect the effectiveness of the filters, but rather reflects patrons' reluctance to ask librarians to unblock sites.

E. Internet Filtering Technology

1. What Is Filtering Software, Who Makes It, and What Does It Do?

Commercially available products that can be configured to block or filter access to certain material on the Internet are among the "technology protection measures" that may be used to attempt to comply with CIPA. There are numerous filtering software products available commercially. Three network-based filtering products—SurfControl's Cyber Patrol, N2H2's Bess/i2100, and Secure Computing's SmartFilter—currently have the lion's share of the public library market. The parties in this case deposed representatives from these three companies. Websense, another network-based blocking product, is also currently used in the public library market, and was discussed at trial.

Filtering software may be installed either on an individual computer or on a computer network. Network-based filtering software products are designed for use on a network of computers and funnel requests for Internet content through a centralized network device. Of the various commercially available blocking products, network-based products are the ones generally marketed to institutions, such as public libraries, that provide Internet access through multiple terminals.

Filtering programs function in a fairly simple way. When an Internet user requests access to a certain Web site or page, either by entering a domain name or

IP address into a Web browser, or by clicking on a link, the filtering software checks that domain name or IP address against a previously compiled "control list" that may contain up to hundreds of thousands of URLs. The three companies deposed in this case have control lists containing between 200,000 and 600,000 URLs. These lists determine which URLs will be blocked.

Filtering software companies divide their control lists into multiple categories for which they have created unique definitions. SurfControl uses 40 such categories, N2H2 uses 35 categories (and seven "exception" categories), Websense uses 30 categories, and Secure Computing uses 30 categories. Filtering software customers choose which categories of URLs they wish to enable. A user "enables" a category in a filtering program by configuring the program to block all of the Web pages listed in that category.

The following is a list of the categories offered by each of these four filtering programs. SurfControl's Cyber Patrol offers the following categories: Adult/Sexually Explicit; Advertisements; Arts & Entertainment; Chat; Computing & Internet; Criminal Skills; Drugs, Alcohol & Tobacco; Education; Finance & Investment; Food & Drink; Gambling; Games; Glamour & Intimate Apparel; Government & Politics; Hacking; Hate Speech; Health & Medicine; Hobbies & Recreation; Hosting Sites; Job Search & Career Development; Kids' Sites; Lifestyle & Culture; Motor Vehicles; News; Personals & Dating; Photo Searches; Real Estate; Reference; Religion; Remote Proxies; Sex Education; Search Engines; Shopping; Sports; Streaming Media; Travel; Usenet News; Violence; Weapons; and Web-based Email.

N2H2 offers the following categories: Adults Only; Alcohol; Auction; Chat; Drugs; Electronic Commerce; Employment Search; Free Mail; Free Pages; Gambling; Games; Hate/Discrimination; Illegal; Jokes; Lingerie; Message/Bulletin Boards; Murder/Suicide; News; Nudity; Personal Information; Personals; Pornography; Profanity; Recreation/Entertainment; School Cheating Information; Search Engines; Search Terms; Sex; Sports; Stocks; Swimsuits; Tasteless/Gross; Tobacco; Violence; and Weapons. The "Nudity" category purports to block only "non-pornographic" images. The "Sex" category is intended to block only those depictions of sexual activity that are not intended to arouse. The "Tasteless/Gross" category includes contents such as "tasteless humor" and "graphic medical or accident scene photos." Additionally, N2H2 offers seven "exception categories." These exception categories include Education, Filtered Search Engine, For Kids, History, Medical, Moderated, and Text/Spoken Only. When an exception category is enabled, access to any Web site or page via a URL associated with both a category and an exception, for example, both "Sex" and "Education," will be allowed, even if the customer has enabled the product to otherwise block the category "Sex." As of November 15, 2001, of those Web sites categorized by N2H2 as "Sex," 3.6% were also categorized as "Education," 2.9% as "Medical," and 1.6% as "History."

Websense offers the following categories: Abortion Advocacy; Advocacy Groups; Adult Material; Business & Economy; Drugs; Education; Entertainment; Gambling; Games; Government; Health; Illegal/Questionable; Information Technology; Internet Communication; Job Search; Militancy/Extremist; News & Media; Productivity Management; Bandwidth Management; Racism/

Hate; Religion; Shopping; Society & Lifestyle; Special Events; Sports; Tasteless; Travel; Vehicles; Violence; and Weapons. The "Adult" category includes "full or partial nudity of individuals," as well as sites offering "light adult humor and literature" and "[s]exually explicit language." The "Sexuality/Pornography" category includes, *inter alia*, "hard-core adult humor and literature" and "[s]exually explicit language." The "Tasteless" category includes "hard-to-stomach sites, including offensive, worthless or useless sites, grotesque or lurid depictions of bodily harm." The "Hacking" category blocks "sites providing information on or promoting illegal or questionable access to or use of communications equipment and/or software."

SmartFilter offers the following categories: Anonymizers/Translators; Art & Culture; Chat; Criminal Skills; Cults/Occult; Dating; Drugs; Entertainment; Extreme/Obscene/Violence; Gambling; Games; General News; Hate Speech; Humor; Investing; Job Search; Lifestyle; Mature; MP3 Sites; Nudity; On-line Sales; Personal Pages; Politics, Opinion & Religion; Portal Sites; Self Help/Health; Sex; Sports; Travel; Usenet News; and Webmail.

Most importantly, no category definition used by filtering software companies is identical to CIPA's definitions of visual depictions that are obscene, child pornography, or harmful to minors. And category definitions and categorization decisions are made without reference to local community standards. Moreover, there is no judicial involvement in the creation of filtering software companies' category definitions and no judicial determination is made before these companies categorize a Web page or site.

Each filtering software company associates each URL in its control list with a "tag" or other identifier that indicates the company's evaluation of whether the content or features of the Web site or page accessed via that URL meets one or more of its category definitions. If a user attempts to access a Web site or page that is blocked by the filter, the user is immediately presented with a screen that indicates that a block has occurred as a result of the operation of the filtering software. These "denial screens" appear only at the point that a user attempts to access a site or page in an enabled category.

All four of the filtering programs on which evidence was presented allow users to customize the category lists that exist on their own PCs or servers by adding or removing specific URLs. For example, if a public librarian charged with administering a library's Internet terminals comes across a Web site that he or she finds objectionable that is not blocked by the filtering program that his or her library is using, then the librarian may add that URL to a category list that exists only on the library's network, and it would thereafter be blocked under that category. Similarly, a customer may remove individual URLs from category lists. Importantly, however, no one but the filtering companies has access to the complete list of URLs in any category. The actual URLs or IP addresses of the Web sites or pages contained in filtering software vendors' category lists are considered to be proprietary information, and are unavailable for review by customers or the general public, including the proprietors of Web sites that are blocked by filtering software.[6]

Filtering software companies do not generally notify the proprietors of Web sites when they block their sites. The only way to discover which URLs are blocked and which are not blocked by any particular filtering company is by testing individual URLs with filtering software, or by entering URLs one by one into the "URL checker" that most filtering software companies provide on their Web sites. Filtering software companies will entertain requests for recategorization from proprietors of Web sites that discover their sites are blocked. Because new pages are constantly being added to the Web, filtering companies provide their customers with periodic updates of category lists. Once a particular Web page or site is categorized, however, filtering companies generally do not re-review the contents of that page or site unless they receive a request to do so, even though the content on individual Web pages and sites changes frequently.

2. The Methods that Filtering Companies Use to Compile Category Lists

While the way in which filtering programs operate is conceptually straightforward—by comparing a requested URL to a previously compiled list of URLs and blocking access to the content at that URL if it appears on the list—accurately compiling and categorizing URLs to form the category lists is a more complex process that is impossible to conduct with any high degree of accuracy. The specific methods that filtering

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[6] Indeed, we granted leave for N2H2's counsel to intervene in order to object to testimony that would potentially reveal N2H2's trade secrets, which he did on several occasions.

software companies use to compile and categorize control lists are, like the lists themselves, proprietary information. We will therefore set forth only general information on the various types of methods that all filtering companies deposed in this case use, and the sources of error that are at once inherent in those methods and unavoidable given the current architecture of the Internet and the current state of the art in automated classification systems. We base our understanding of these methods largely on the detailed testimony and expert report of Dr. Geoffrey Nunberg, which we credit. The plaintiffs offered, and the Court qualified, Nunberg as an expert witness on automated classification systems.[7]

When compiling and categorizing URLs for their category lists, filtering software companies go through two distinct phases. First, they must collect or "harvest" the relevant URLs from the vast number of sites that exist on the Web. Second, they must sort through the URLs they have collected to determine under which of the company's self-defined categories (if any), they should be classified. These tasks necessarily result in a tradeoff between overblocking (i.e., the blocking of content that does not meet the category definitions established by CIPA or by the filtering software companies), and underblocking (i.e., leaving off

[7] Geoffrey Nunberg (Ph.D., Linguistics, C.U.N.Y.1977) is a researcher at the Center for the Study of Language and Information at Stanford University and a Consulting Full Professor of Linguistics at Stanford University. Until 2001, he was also a principal scientist at the Xerox Palo Alto Research Center. His research centers on automated classification systems, with a focus on classifying documents on the Web with respect to their linguistic properties. He has published his research in numerous professional journals, including peer-reviewed journals.

of a control list a URL that contains content that would meet the category definitions defined by CIPA or the filtering software companies).

a. The "Harvesting" Phase

Filtering software companies, given their limited resources, do not attempt to index or classify all of the billions of pages that exist on the Web. Instead, the set of pages that they attempt to examine and classify is restricted to a small portion of the Web. The companies use a variety of automated and manual methods to identify a universe of Web sites and pages to "harvest" for classification. These methods include: entering certain key words into search engines; following links from a variety of online directories (e.g., generalized directories like Yahoo or various specialized directories, such as those that provide links to sexually explicit content); reviewing lists of newly-registered domain names; buying or licensing lists of URLs from third parties; "mining" access logs maintained by their customers; and reviewing other submissions from customers and the public. The goal of each of these methods is to identify as many URLs as possible that are likely to contain content that falls within the filtering companies' category definitions.

The first method, entering certain keywords into commercial search engines, suffers from several limitations. First, the Web pages that may be "harvested" through this method are limited to those pages that search engines have already identified. However, as noted above, a substantial portion of the Web is not even theoretically indexable (because it is not linked to by any previously known page), and only approximately 50% of the pages that are theoretically indexable have

actually been indexed by search engines. We are satisfied that the remainder of the indexable Web, and the vast "Deep Web," which cannot currently be indexed, includes materials that meet CIPA's categories of visual depictions that are obscene, child pornography, and harmful to minors. These portions of the Web cannot presently be harvested through the methods that filtering software companies use (except through reporting by customers or by observing users' log files), because they are not linked to other known pages. A user can, however, gain access to a Web site in the unindexed Web or the Deep Web if the Web site's proprietor or some other third party informs the user of the site's URL. Some Web sites, for example, send out mass email advertisements containing the site's URL, the spamming process we have described above.

Second, the search engines that software companies use for harvesting are able to search text only, not images. This is of critical importance, because CIPA, by its own terms, covers only "visual depictions." 20 U.S.C. § 9134(f)(1)(A)(i); 47 U.S.C. § 254(h)(5)(B)(i). Image recognition technology is immature, ineffective, and unlikely to improve substantially in the near future. None of the filtering software companies deposed in this case employs image recognition technology when harvesting or categorizing URLs. Due to the reliance on automated text analysis and the absence of image recognition technology, a Web page with sexually explicit images and no text cannot be harvested using a search engine. This problem is complicated by the fact that Web site publishers may use image files rather than text to represent words, i.e., they may use a file that computers understand to be a picture, like a

photograph of a printed word, rather than regular text, making automated review of their textual content impossible. For example, if the Playboy Web site displays its name using a logo rather than regular text, a search engine would not see or recognize the Playboy name in that logo.

In addition to collecting URLs through search engines and Web directories (particularly those specializing in sexually explicit sites or other categories relevant to one of the filtering companies' category definitions), and by mining user logs and collecting URLs submitted by users, the filtering companies expand their list of harvested URLs by using "spidering" software that can "crawl" the lists of pages produced by the previous four methods, following their links downward to bring back the pages to which they link (and the pages to which those pages link, and so on, but usually down only a few levels). This spidering software uses the same type of technology that commercial Web search engines use.

While useful in expanding the number of relevant URLs, the ability to retrieve additional pages through this approach is limited by the architectural feature of the Web that page-to-page links tend to converge rather than diverge. That means that the more pages from which one spiders downward through links, the smaller the proportion of new sites one will uncover; if spidering the links of 1000 sites retrieved through a search engine or Web directory turns up 500 additional distinct adult sites, spidering an additional 1000 sites may turn up, for example, only 250 additional distinct sites, and the proportion of new sites uncovered will continue to diminish as more pages are spidered.

These limitations on the technology used to harvest a set of URLs for review will necessarily lead to substantial underblocking of material with respect to both the category definitions employed by filtering software companies and CIPA's definitions of visual depictions that are obscene, child pornography, or harmful to minors.

b. The "Winnowing" or Categorization Phase

Once the URLs have been harvested, some filtering software companies use automated key word analysis tools to evaluate the content and/or features of Web sites or pages accessed via a particular URL and to tentatively prioritize or categorize them. This process may be characterized as "winnowing" the harvested URLs. Automated systems currently used by filtering software vendors to prioritize, and to categorize or tentatively categorize the content and/or features of a Web site or page accessed via a particular URL operate by means of (1) simple key word searching, and (2) the use of statistical algorithms that rely on the frequency and structure of various linguistic features in a Web page's text. The automated systems used to categorize pages do not include image recognition technology. All of the filtering companies deposed in the case also employ human review of some or all collected Web pages at some point during the process of categorizing Web pages. As with the harvesting process, each technique employed in the winnowing process is subject to limitations that can result in both overblocking and underblocking.

First, simple key-word-based filters are subject to the obvious limitation that no string of words can identify all sites that contain sexually explicit content,

and most strings of words are likely to appear in Web sites that are not properly classified as containing sexually explicit content. As noted above, filtering software companies also use more sophisticated automated classification systems for the statistical classification of texts. These systems assign weights to words or other textual features and use algorithms to determine whether a text belongs to a certain category. These algorithms sometimes make reference to the position of a word within a text or its relative proximity to other words. The weights are usually determined by machine learning methods (often described as "artificial intelligence"). In this procedure, which resembles an automated form of trial and error, a system is given a "training set" consisting of documents preclassified into two or more groups, along with a set of features that might be potentially useful in classifying the sets. The system then "learns" rules that assign weights to those features according to how well they work in classification, and assigns each new document to a category with a certain probability.

Notwithstanding their "artificial intelligence" description, automated text classification systems are unable to grasp many distinctions between types of content that would be obvious to a human. And of critical importance, no presently conceivable technology can make the judgments necessary to determine whether a visual depiction fits the legal definitions of obscenity, child pornography, or harmful to minors.

Finally, all the filtering software companies deposed in this case use some form of human review in their process of winnowing and categorizing Web pages, although one company admitted to categorizing some Web pages without any human review. SmartFilter

states that "the final categorization of every Web site is done by a human reviewer." Another filtering company asserts that of the 10,000 to 30,000 Web pages that enter the "work queue" to be categorized each day, two to three percent of those are automatically categorized by their PornByRef system (which only applies to materials classified in the pornography category), and the remainder are categorized by human review. SurfControl also states that no URL is ever added to its database without human review.

Human review of Web pages has the advantage of allowing more nuanced, if not more accurate, interpretations than automated classification systems are capable of making, but suffers from its own sources of error. The filtering software companies involved here have limited staff, of between eight and a few dozen people, available for hand reviewing Web pages. The reviewers that are employed by these companies base their categorization decisions on both the text and the visual depictions that appear on the sites or pages they are assigned to review. Human reviewers generally focus on English language Web sites, and are generally not required to be multi-lingual.

Given the speed at which human reviewers must work to keep up with even a fraction of the approximately 1.5 million pages added to the publicly indexable Web each day, human error is inevitable. Errors are likely to result from boredom or lack of attentiveness, overzealousness, or a desire to "err on the side of caution" by screening out material that might be offensive to some customers, even if it does not fit within any of the company's category definitions. None of the filtering companies trains its reviewers in the legal definitions concerning what is obscene, child pornography, or harmful to minors, and none instructs reviewers to take community standards into account when making categorization decisions.

Perhaps because of limitations on the number of human reviewers and because of the large number of new pages that are added to the Web every day, filtering companies also widely engage in the practice of categorizing entire Web sites at the "root URL," rather than engaging in a more fine-grained analysis of the individual pages within a Web site. For example, the filtering software companies deposed in this case all categorize the entire Playboy Web site as Adult, Sexually Explicit, or Pornography. They do not differentiate between pages within the site containing sexually explicit images or text, and for example, pages containing no sexually explicit content, such as the text of interviews of celebrities or politicians. If the "root" or "top-level" URL of a Web site is given a category tag, then access to all content on that Web site will be blocked if the assigned category is enabled by a customer.

In some cases, whole Web sites are blocked because the filtering companies focus only on the content of the home page that is accessed by entering the root URL. Entire Web sites containing multiple Web pages are commonly categorized without human review of each individual page on that site. Web sites that may contain multiple Web pages and that require authentication or payment for access are commonly categorized based solely on a human reviewer's evaluation of the pages that may be viewed prior to reaching the authentication or payment page.

Because there may be hundreds or thousands of pages under a root URL, filtering companies make it

their primary mission to categorize the root URL, and categorize subsidiary pages if the need arises or if there is time. This form of overblocking is called "inheritance," because lower-level pages inherit the categorization of the root URL without regard to their specific content. In some cases, "reverse inheritance" also occurs, i.e., parent sites inherit the classification of pages in a lower level of the site. This might happen when pages with sexual content appear in a Web site that is devoted primarily to non-sexual content. For example, N2H2's Bess filtering product classifies every page in the Salon.com Web site, which contains a wide range of news and cultural commentary, as "Sex, Profanity," based on the fact that the site includes a regular column that deals with sexual issues.

Blocking by both domain name and IP address is another practice in which filtering companies engage that is a function both of the architecture of the Web and of the exigencies of dealing with the rapidly expanding number of Web pages. The category lists maintained by filtering software companies can include URLs in either their human-readable domain name address form, their numeric IP address form, or both. Through "virtual hosting" services, hundreds of thousands of Web sites with distinct domain names may share a single numeric IP address. To the extent that filtering companies block the IP addresses of virtual hosting services, they will necessarily block a substantial amount of content without reviewing it, and will likely overblock a substantial amount of content.

Another technique that filtering companies use in order to deal with a structural feature of the Internet is blocking the root level URLs of so-called "loophole" Web sites. These are Web sites that provide access to a

particular Web page, but display in the user's browser a URL that is different from the URL with which the particular page is usually associated. Because of this feature, they provide a "loophole" that can be used to get around filtering software, i.e., they display a URL that is different from the one that appears on the filtering company's control list. "Loophole" Web sites include caches of Web pages that have been removed from their original location, "anonymizer" sites, and translation sites.

Caches are archived copies that some search engines, such as Google, keep of the Web pages they index. The cached copy stored by Google will have a URL that is different from the original URL. Because Web sites often change rapidly, caches are the only way to access pages that have been taken down, revised, or have changed their URLs for some reason. For example, a magazine might place its current stories under a given URL, and replace them monthly with new stories. If a user wanted to find an article published six months ago, he or she would be unable to access it if not for Google's cached version.

Some sites on the Web serve as a proxy or intermediary between a user and another Web page. When using a proxy server, a user does not access the page from its original URL, but rather from the URL of the proxy server. One type of proxy service is an "anonymizer." Users may access Web sites indirectly via an anonymizer when they do not want the Web site they are visiting to be able to determine the IP address from which they are accessing the site, or to leave

"cookies" on their browser.[8] Some proxy servers can be used to attempt to translate Web page content from one language to another. Rather than directly accessing the original Web page in its original language, users can instead indirectly access the page via a proxy server offering translation features.

As noted above, filtering companies often block loophole sites, such as caches, anonymizers, and translation sites. The practice of blocking loophole sites necessarily results in a significant amount of overblocking, because the vast majority of the pages that are cached, for example, do not contain content that would match a filtering company's category definitions. Filters that do not block these loophole sites, however, may enable users to access any URL on the Web via the loophole site, thus resulting in substantial underblocking.

c. The Process for "Re-Reviewing" Web Pages After Their Initial Categorization

Most filtering software companies do not engage in subsequent reviews of categorized sites or pages on a scheduled basis. Priority is placed on reviewing and categorizing new sites and pages, rather than on re-reviewing already categorized sites and pages. Typically, a filtering software vendor's previous categorization of a Web site is not re-reviewed for accuracy when new pages are added to the Web site. To the extent the Web site was previously categorized as a whole, the

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8 A "cookie" is "a small file or part of a file stored on a World Wide Web user's computer, created and subsequently read by a Web site server, and containing personal information (as a user identification code, customized preferences, or a record of pages visited)." *Merriam Webster's Collegiate Dictionary, available at http://www.m-w.com/dictionary.htm.*

new pages added to the site usually share the categorization assigned by the blocking product vendor. This necessarily results in both over- and underblocking, because, as noted above, the content of Web pages and Web sites changes relatively rapidly.

In addition to the content on Web sites or pages changing rapidly, Web sites themselves may disappear and be replaced by sites with entirely different content. If an IP address associated with a particular Web site is blocked under a particular category and the Web site goes out of existence, then the IP address likely would be reassigned to a different Web site, either by an Internet service provider or by a registration organization, such as the American Registry for Internet Numbers, *see http://www.arin.net.* In that case, the site that received the reassigned IP address would likely be miscategorized. Because filtering companies do not engage in systematic re-review of their category lists, such a site would likely remain miscategorized unless someone submitted it to the filtering company for re-review, increasing the incidence of over- and underblocking.

This failure to re-review Web pages primarily increases a filtering company's rate of overblocking. However, if a filtering company does not re-review Web pages after it determines that they do not fall into any of its blocking categories, then that would result in underblocking (because, for example, a page might add sexually explicit content).

3. The Inherent Tradeoff Between Overblocking and Underblocking

There is an inherent tradeoff between any filter's rate of overblocking (which information scientists also

call "precision") and its rate of underblocking (which is also referred to as "recall"). The rate of overblocking or precision is measured by the proportion of the things a classification system assigns to a certain category that are appropriately classified. The plaintiffs' expert, Dr. Nunberg, provided the hypothetical example of a classification system that is asked to pick out pictures of dogs from a database consisting of 1000 pictures of animals, of which 80 were actually dogs. If it returned 100 hits, of which 80 were in fact pictures of dogs, and the remaining 20 were pictures of cats, horses, and deer, we would say that the system identified dog pictures with a precision of 80%. This would be analogous to a filter that overblocked at a rate of 20%.

The recall measure involves determining what proportion of the actual members of a category the classification system has been able to identify. For example, if the hypothetical animal-picture database contained a total of 200 pictures of dogs, and the system identified 80 of them and failed to identify 120, it would have performed with a recall of 40%. This would be analogous to a filter that underblocked 60% of the material in a category.

In automated classification systems, there is always a tradeoff between precision and recall. In the animal-picture example, the recall could be improved by using a looser set of criteria to identify the dog pictures in the set, such as any animal with four legs, and all the dogs would be identified, but cats and other animals would also be included, with a resulting loss of precision. The same tradeoff exists between rates of overblocking and underblocking in filtering systems that use automated classification systems. For example, an automated system that classifies any Web page that contains the

word "sex" as sexually explicit will underblock much less, but overblock much more, than a system that classifies any Web page containing the phrase "free pictures of people having sex" as sexually explicit.

This tradeoff between overblocking and underblocking also applies not just to automated classification systems, but also to filters that use only human review. Given the approximately two billion pages that exist on the Web, the 1.5 million new pages that are added daily, and the rate at which content on existing pages changes, if a filtering company blocks only those Web pages that have been reviewed by humans, it will be impossible, as a practical matter, to avoid vast amounts of underblocking. Techniques used by human reviewers such as blocking at the IP address level, domain name level, or directory level reduce the rates of underblocking, but necessarily increase the rates of overblocking, as discussed above.

To use a simple example, it would be easy to design a filter intended to block sexually explicit speech that completely avoids overblocking. Such a filter would have only a single sexually explicit Web site on its control list, which could be reviewed daily to ensure that its content does not change. While there would be no overblocking problem with such a filter, such a filter would have a severe underblocking problem, as it would fail to block all the sexually explicit speech on the Web other than the one site on its control list. Similarly, it would also be easy to design a filter intended to block sexually explicit speech that completely avoids underblocking. Such a filter would operate by permitting users to view only a single Web site, e.g., the Sesame Street Web site. While there would be no underblocking problem with such a filter, it would have a

severe overblocking problem, as it would block access to millions of non-sexually explicit sites on the Web other than the Sesame Street site.

While it is thus quite simple to design a filter that does not overblock, and equally simple to design a filter that does not underblock, it is currently impossible, given the Internet's size, rate of growth, rate of change, and architecture, and given the state of the art of automated classification systems, to develop a filter that neither underblocks nor overblocks a substantial amount of speech. The more effective a filter is at blocking Web sites in a given category, the more the filter will necessarily overblock. Any filter that is reasonably effective in preventing users from accessing sexually explicit content on the Web will necessarily block substantial amounts of non-sexually explicit speech.

4. Attempts to Quantify Filtering Programs' Rates of Over-and Underblocking

The government presented three studies, two from expert witnesses, and one from a librarian fact witness who conducted a study using Internet use logs from his own library, that attempt to quantify the over- and underblocking rates of five different filtering programs. The plaintiffs presented one expert witness who attempted to quantify the rates of over- and underblocking for various programs. Each of these attempts to quantify rates of over- and underblocking suffers from various methodological flaws.

The fundamental problem with calculating over- and underblocking rates is selecting a universe of Web sites or Web pages to serve as the set to be tested. The studies that the parties submitted in this case took two

different approaches to this problem. Two of the studies, one prepared by the plaintiffs' expert witness Chris Hunter, a graduate student at the University of Pennsylvania, and the other prepared by the defendants' expert, Chris Lemmons of eTesting Laboratories, in Research Triangle Park, North Carolina, approached this problem by compiling two separate lists of Web sites, one of URLs that they deemed should be blocked according to the filters' criteria, and another of URLs that they deemed should not be blocked according to the filters' criteria. They compiled these lists by choosing Web sites from the results of certain key word searches.[9] The problem with this

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[9] Hunter drew three different "samples" for his test. The first consisted of "50 randomly generated Web pages from the Webcrawler search engine." The "second sample of 50 Web pages was drawn from searches for the terms 'yahoo, warez, hotmail, sex, and MP3,' using the AltaVista.com search engine." And the "final sample of 100 Web sites was drawn from the sites of organizations who filed amicus briefs in support of the ACLU's challenges to the Community [sic] Decency Act (CDA) and COPA [the Children's Online Protection Act], and from Internet portals, political Web sites, feminist Web sites, hate speech sites, gambling sites, religious sites, gay pride/homosexual sites, alcohol, tobacco, and drug sites, pornography sites, new sites, violent game sites, safe sex sites, and pro and anti-abortion sites listed on the popular Web directory, Yahoo.com."

Lemmons testified that he compiled the list of sexually explicit sites that should have been blocked by entering the terms "free adult sex, anal sex, oral sex, fisting lesbians, gay sex, interracial sex, big tits, blow job, shaved pussy, and bondage" into the Google search engine and then "surfing" through links from pages generated by the list of sites that the search engine returned. Using this method, he compiled a list of 197 sites that he determined should be blocked according to the filtering programs' category definitions. Lemmons also attempted to compile a list of "sensitive" Web sites that, although they should not have been

selection method is that it is neither random, nor does it necessarily approximate the universe of Web pages that library patrons visit.

The two other studies, one by David Biek, head librarian at the Tacoma Public Library's main branch, and one by Cory Finnell of Certus Consulting Group, of Seattle, Washington, chose actual logs of Web pages visited by library patrons during specific time periods as the universe of Web pages to analyze. This method, while surely not as accurate as a truly random sample of the indexed Web would be (assuming it would be possible to take such a sample), has the virtue of using the actual Web sites that library patrons visited during a specific period. Because library patrons selected the universe of Web sites that Biek and Finnell's studies analyzed, this removes the possibility of bias resulting from the study author's selection of the universe of sites to be reviewed. We find that the Lemmons and Hunter studies are of little probative value because of the methodology used to select the sample universe of Web sites to be tested. We will therefore focus on the studies conducted by Finnell and Biek in trying to ascertain estimates of the rates of over- and underblocking that takes place when filters are used in public libraries.

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blocked according to the filtering programs' category definitions, might have been mistakenly blocked. In order to do this, he used the same method of entering terms into the Google search engine and surfing through the results. He used the following terms to compile this list: "breast feeding, bondages, fetishes, ebony, gay issues, women's health, lesbian, homosexual, vagina, vaginal dryness, pain, anal cancer, teen issues, safe sex, penis, pregnant, interracial, sex education, penis enlargement, breast enlargement, . . . and shave."

The government hired expert witness Cory Finnell to study the Internet logs compiled by the public libraries systems in Tacoma, Washington; Westerville, Ohio; and Greenville, South Carolina. Each of these libraries uses filtering software that keeps a log of information about individual Web site requests made by library patrons. Finnell, whose consulting firm specializes in data analysis, has substantial experience evaluating Internet access logs generated on networked systems. He spent more than a year developing a reporting tool for N2H2, and, in the course of that work, acquired a familiarity with the design and operation of Internet filtering products.

The Tacoma library uses Cyber Patrol filtering software, and logs information only on sites that were blocked. Finnell worked from a list of all sites that were blocked in the Tacoma public library in the month of August 2001. The Westerville library uses the Websense filtering product, and logs information on both blocked sites and non-blocked sites. When the logs reach a certain size, they are overwritten by new usage logs. Because of this overwriting feature, logs were available to Finnell only for the relatively short period from October 1, 2001 to October 3, 2001. The Greenville library uses N2H2's filtering product and logs both blocked sites and sites that patrons accessed. The logs contain more than 500,000 records per day. Because of the volume of the records, Finnell restricted his analysis to the period from August 2, 2001 to August 15, 2001.

Finnell calculated an overblocking rate for each of the three libraries by examining the host Web site containing each of the blocked pages. He did not employ a sampling technique, but instead examined

each blocked Web site. If the contents of a host Web site or the pages within the Web site were consistent with the filtering product's definition of the category under which the site was blocked, Finnell considered it to be an accurate block. Finnell and three others, two of whom were temporary employees, examined the Web sites to determine whether they were consistent with the filtering companies' category definitions. Their review was, of course, necessarily limited by: (1) the clarity of the filtering companies' category definitions; (2) Finnell's and his employees' interpretations of the definitions; and (3) human error. The study's reliability is also undercut by the fact that Finnell failed to archive the blocked Web pages as they existed either at the point that a patron in one of the three libraries was denied access or when Finnell and his team reviewed the pages. It is therefore impossible for anyone to check the accuracy and consistency of Finnell's review team, or to know whether the pages contained the same content when the block occurred as they did when Finnell's team reviewed them. This is a key flaw, because the results of the study depend on individual determinations as to overblocking and underblocking, in which Finnell and his team were required to compare what they saw on the Web pages that they reviewed with standard definitions provided by the filtering company.

Tacoma library's Cyber Patrol software blocked 836 unique Web sites during the month of August. Finnell determined that 783 of those blocks were accurate and that 53 were inaccurate.[10] The error rate for Cyber

[10] If separate patrons attempted to reach the same Web site, or one or more patrons attempted to access more than one page on a single Web site, Finnell counted these attempts as a single block.

Patrol was therefore estimated to be 6.34%, and the true error rate was estimated with 95% confidence to lie within the range of 4.69% to 7.99%.[11] Finnell and his team reviewed 185 unique Web sites that were blocked by Westerville Library's Websense filter during the logged period and determined that 158 of them were accurate and that 27 of them were inaccurate. He therefore estimated the Websense filter's overblocking rate at 14.59% with a 95% confidence interval of 9.51% to 19.68%. Additionally, Finnell examined 1,674 unique Web sites that were blocked by the Greenville Library's N2H2 filter during the relevant period and determined that 1,520 were accurate and that 87 were inaccurate. This yields an estimated overblocking rate of 5.41% and a 95% confidence interval of 4.33% to 6.55%.

Finnell's methodology was materially flawed in that it understates the rate of overblocking for the following reasons. First, patrons from the three libraries knew that the filters were operating, and may have been deterred from attempting to access Web sites that they perceived to be "borderline" sites, i.e., those that may or may not have been appropriately filtered according to the filtering companies' category definitions. Second,

For example, the total number of blocked requests for Web pages at Tacoma Library during the logged period was 2,812, but Finnell counted this as only 895 blocks of unique Web sites. Of the 895 unique blocked sites, Finnell was unable to access 59, yielding 836 unique blocked sites for his team to review.

[11] The confidence intervals that Finnell calculated represent the range of percentages within which we can be 95% confident that the actual rate of overblocking in that particular library falls. We note that these confidence intervals assume that the time period for which the study assessed the library's internet logs constitutes a random and representative sample.

in their cross-examination of Finnell, the plaintiffs offered screen shots of a number of Web sites that, according to Finnell, had been appropriately blocked, but that Finnell admitted contained only benign materials. Finnell's explanation was that the Web sites must have changed between the time when he conducted the study and the time of the trial, but because he did not archive the images as they existed when his team reviewed them for the study, there is no way to verify this. Third, because of the way in which Finnell counted blocked Web sites—i.e., if separate patrons attempted to reach the same Web site, or one or more patrons attempted to access more than one page on a single Web site, Finnell counted these attempts as a single block, *see supra* note 10—his results necessarily understate the number of times that patrons were erroneously denied access to information.

At all events, there is no doubt that Finnell's estimated rates of overblocking, which are based on the filtering companies' own category definitions, significantly understate the rate of overblocking with respect to CIPA's category definitions for filtering for adults. The filters used in the Tacoma, Westerville, and Greenville libraries were configured to block, among other things, images of full nudity and sexually explicit materials. There is no dispute, however, that these categories are far broader than CIPA's categories of visual depictions that are obscene, or child pornography, the two categories of material that libraries subject to CIPA must certify that they filter during adults' use of the Internet.

Finnell's study also calculated underblocking rates with respect to the Westerville and Greenville Libraries (both of which logged not only their blocked sites,

but all sites visited by their patrons), by taking random samples of URLs from the list of sites that were not blocked. The study used a sample of 159 sites that were accessed by Westerville patrons and determined that only one of them should have been blocked under the software's category definitions, yielding an underblocking rate of 0.6%. Given the size of the sample, the 95% confidence interval is 0% to 1.86%. The study examined a sample of 254 Web sites accessed by patrons in Greenville and found that three of them should have been blocked under the filtering software's category definitions. This results in an estimated underblocking rate of 1.2% with a 95% confidence interval ranging from 0% to 2.51%.

We do not credit Finnell's estimates of the rates of underblocking in the Westerville and Greenville public libraries for several reasons. First, Finnell's estimates likely understate the actual rate of underblocking because patrons, who knew that filtering programs were operating in the Greenville and Westerville Libraries, may have refrained from attempting to access sites with sexually explicit materials, or other contents that they knew would probably meet a filtering program's blocked categories. Second, and most importantly, we think that the formula that Finnell used to calculate the rate of underblocking in these two libraries is not as meaningful as the formula that information scientists typically use to calculate a rate of recall, which we describe above in Subsection II.E.3. As Dr. Nunberg explained, the standard method that information scientists use to calculate a rate of recall is to sort a set of items into two groups, those that fall into a particular category (e.g., those that should have been blocked by a filter) and those that do not. The rate of recall is then

calculated by dividing the number of items that the system correctly identified as belonging to the category by the total number of items in the category.

In the example above, we discussed a database that contained 1000 photographs. Assume that 200 of these photographs were pictures of dogs. If, for example, a classification system designed to identify pictures of dogs identified 80 of the dog pictures and failed to identify 120, it would have performed with a recall rate of 40%. This would be analogous to a filter that underblocked at a rate of 60%. To calculate the recall rate of the filters in the Westerville and Greenville public libraries in accordance with the standard method described above, Finnell should have taken a sample of sites from the libraries' Internet use logs (including both sites that were blocked and sites that were not), and divided the number of sites in the sample that the filter incorrectly failed to block by the total number of sites in the sample that should have been blocked. What Finnell did instead was to take a sample of sites that were not blocked, and divide the total number of sites in this sample by the number of sites in the sample that should have been blocked. This made the denominator that Finnell used much larger than it would have been had he used the standard method for calculating recall, consequently making the underblocking rate that he calculated much lower than it would have been under the standard method.[12]

[12] To illustrate the two different methods, consider a random sample of 1010 web sites taken from a library's Internet use log, 10 of which fall within the category that a filter is intended to block (e.g., pornography), and suppose that the filter incorrectly failed to block 2 of the 10 sites that it should have blocked and did not block any sites that should not have been blocked. The standard method of quantifying the rate of underblocking would divide the number of sites in the sample that the filter incorrectly failed to block by the number of sites in the sample that the filter should have blocked, yielding an underblocking rate in this example of 20%. Finnell's study, however, calculated the underblocking rate by dividing the number of sites that the filter incorrectly failed to block by the total number of sites in the sample that were not blocked (whether correctly or incorrectly) yielding an underblocking rate in this example of only .2%.

Moreover, despite the relatively low rates of underblocking that Finnell's study found, librarians from several of the libraries proffered by defendants that use blocking products, including Greenville, Tacoma, and Westerville, testified that there are instances of underblocking in their libraries. No quantitative evidence was presented comparing the effectiveness of filters and other alternative methods used by libraries to prevent patrons from accessing visual depictions that are obscene, child pornography, or in the case of minors, harmful to minors.

Biek undertook a similar study of the overblocking rates that result from the Tacoma Library's use of the Cyber Patrol software. He began with the 3,733 individual blocks that occurred in the Tacoma Library in October 2000 and drew from this data set a random sample of 786 URLs. He calculated two rates of overblocking, one with respect to the Tacoma Library's policy on Internet use—that the pictorial content of the site may not include "graphic materials depicting full nudity and sexual acts which are portrayed obviously and exclusively for sensational or pornographic purposes"—and the other with respect to Cyber Patrol's own category definitions. He estimated that Cyber Patrol overblocked 4% of all Web pages in October 2000 with respect to the definitions of the Tacoma Library's

Internet Policy and 2% of all pages with respect to Cyber Patrol's own category definitions.[13]

It is difficult to determine how reliable Biek's conclusions are, because he did not keep records of the raw data that he used in his study; nor did he archive images of the Web pages as they looked when he made the determination whether they were properly classified by the Cyber Patrol program. Without this information, it is impossible to verify his conclusions (or to undermine them). And Biek's study certainly understates Cyber Patrol's overblocking rate for some of the same reasons that Finnell's study likely understates the true rates of overblocking used in the libraries that he studied.

We also note that Finnell's study, which analyzed a set of Internet logs from the Tacoma Library during which the same filtering program was operating with the same set of blocking categories enabled, found a significantly higher rate of overblocking than the Biek study did. Biek found a rate of overblocking of approximately 2% while the Finnell study estimated a 6.34% rate of overblocking. At all events, the category definitions employed by CIPA, at least with respect to adult use—visual depictions that are obscene or child pornography—are narrower than the materials prohibited by the Tacoma Library policy, and therefore Biek's study understates the rate of overblocking with respect to CIPA's definitions for adults.

In sum, we think that Finnell's study, while we do not credit its estimates of underblocking, is useful because it states lower bounds with respect to the rates

[13] According to Biek, the sample size that he used yielded a 95% confidence interval of plus or minus 3.11%.

of overblocking that occurred when the Cyber Patrol, Websense, and N2H2 filters were operating in public libraries. While these rates are substantial—between nearly 6% and 15%—we think, for the reasons stated above, that they greatly understate the actual rates of overblocking that occurs, and therefore cannot be considered as anything more than minimum estimates of the rates of overblocking that happens in all filtering programs.

5. Methods of Obtaining Examples of Erroneously Blocked Web Sites

The plaintiffs assembled a list of several thousand Web sites that they contend were, at the time of the study, likely to have been erroneously blocked by one or more of four major commercial filtering programs: SurfControl Cyber Patrol 6.0.1.47, N2H2 Internet Filtering 2.0, Secure Computing SmartFilter 3.0.0.01, and Websense Enterprise 4.3.0. They compiled this list using a two- step process. First, Benjamin Edelman, an expert witness who testified before us, compiled a list of more than 500,000 URLs and devised a program to feed them through all four filtering programs in order to compile a list of URLs that might have been erroneously blocked by one or more of the programs.[14] Second, Edelman forwarded subsets of the list that he compiled to librarians and professors of library science whom the plaintiffs had hired to review the blocked sites for suitability in the public library context.

[14] Edelman is a Harvard University student and a systems administrator and multimedia specialist at the Berkman Center for Internet and Society at Harvard Law School. Despite Edelman's young age, he has been doing consulting work on Internet-related issues for nine years, since he was in junior high school.

Edelman assembled the list of URLs by compiling Web pages that were blocked by the following categories in the four programs: Cyber Patrol: Adult/Sexually Explicit; N2H2: Adults Only, Nudity, Pornography, and Sex, with "exceptions" engaged in the categories of Education, For Kids, History, Medical, Moderated, and Text/Spoken Only; SmartFilter: Sex, Nudity, Mature, and Extreme; Websense: Adult Content, Nudity, and Sex.

Edelman then assembled a database of Web sites for possible testing. He derived this list by automatically compiling URLs from the Yahoo index of Web sites, taking them from categories from the Yahoo index that differed significantly from the classifications that he had enabled in each of the blocking programs (taking, for example, Web sites from Yahoo's "Government" category). He then expanded this list by entering URLs taken from the Yahoo index into the Google search engine's "related" search function, which provides the user with a list of similar sites. Edelman also included and excluded specific Web sites at the request of the plaintiffs' counsel.

Taking the list of more than 500,000 URLs that he had compiled, Edelman used an automated system that he had developed to test whether particular URLs were blocked by each of the four filtering programs. This testing took place between February and October 2001. He recorded the specific dates on which particular sites were blocked by particular programs, and, using commercial archiving software, archived the contents of the home page of the blocked Web sites (and in some instances the pages linked to from the home

page) as it existed when it was blocked.[15] Through this process, Edelman, whose testimony we credit, compiled a list of 6,777 URLs that were blocked by one or more of the four programs. Because these sites were chosen from categories from the Yahoo directory that were unrelated to the filtering categories that were enabled during the test (i.e., "Government" vs. "Nudity"), he reasoned that they were likely erroneously blocked. As explained in the margin, Edelman repeated his testing and discovered that Cyber Patrol had unblocked most of the pages on the list of 6,777 after he had published the list on his Web site. His records indicate that an employee of SurfControl (the company that produces Cyber Patrol software) accessed his site and presumably checked out the URLs on the list, thus confirming Edelman's judgment that the majority of URLs on the list were erroneously blocked.[16]

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[15] The archiving process in some cases took up to 48 hours from when the page was blocked.

[16] In October 2001, Edelman published the results of his initial testing on his Web site. In February and March 2002 he repeated his testing of the 6,777 URLs originally found to be blocked by at least one of the blocking products, in order to determine whether and to what extent the blocking product vendors had corrected the mistakes that he publicized. Of those URLs blocked by N2H2 in the October 2001 testing, 55.10% remained blocked when tested by Edelman in March 2002. Of those URLs blocked by Websense in the October 2001 testing, 76.28% remained blocked when tested by Edelman in February 2002. Of those URLs blocked by SurfControl's Cyber Patrol product, only 7.16% remained blocked, i.e., Cyber Patrol had unblocked almost 93% of the Web pages originally blocked. Because the results posted to his Web site were accessed by an employee of SurfControl (as evidenced by Edelman's records of who was accessing his Web site), we infer that Cyber Patrol had determined that 93% of all 6,777 pages, or 6,302 Web pages, were originally wrongly blocked by the product.

Edelman forwarded the list of blocked sites to Dr. Joseph Janes, an Assistant Professor in the Information School of the University of Washington who also testified at trial as an expert witness. Janes reviewed the sites that Edelman compiled to determine whether they are consistent with library collection development, i.e., whether they are sites to which a reference librarian would, consistent with professional standards, direct a patron as a source of information.[17]

Edelman forwarded Janes a list of 6,775 Web sites, almost the entire list of blocked sites that he collected, from which Janes took a random sample of 859 using

[17] Two other expert witnesses reviewed subsets of the list of Web pages that Edelman compiled. Dr. Michael T. Ryan, Director of the Rare Book and Manuscript Library and of the Center for Electronic Text and Image at the University of Pennsylvania, reviewed a list of 204 sites that Edelman forwarded to him in order to determine their appropriateness and usefulness in the library setting. Because the sites that Ryan reviewed were not selected randomly (i.e., they were chosen by plaintiffs' counsel), his study says little about the character of the set of 6,777 sites that Edelman compiled, or the total amount of overblocking by the four filtering programs that Edelman used.

Anne Lipow, a practicing librarian for more than 30 years and the director of a library consulting firm, also reviewed the same list of 204 URLs from the set that Edelman had collected for their appropriateness for a library's collection. She categorized sites in four different levels according to their appropriateness for a public library's collection. Again, because these URLs were not selected randomly, Lipow's study is not particularly relevant to the total set that Edelman compiled, or to the total amount of overblocking by the four filtering programs that Edelman used.

Although the methodology used to select the list of Web pages that was forwarded to Ryan and Lipow is problematic, Ryan's and Lipow's testimony established that many of the erroneously blocked sites that Edelman identified would be useful and appropriate sources of information for library patrons.

the SPSS statistical software package. Janes indicated that he chose a sample size of 859 because it would yield a 95% confidence interval of plus or minus 2.5%. Janes recruited a group of 16 reviewers, most of whom were current or former students at the University of Washington's Information School, to help him identify which sites were appropriate for library use. We describe the process that he used in the margin.[18] Due

[18] All of the reviewers that Janes recruited had some relevant experience in library reference services or library collection development. Janes divided the reviewers into two groups, a group of 11 less experienced reviewers, and a group of five more experienced reviewers. Janes assigned the less experienced group to do a first-round review with the purpose of identifying the most obviously overblocked sites. The more experienced group was to review the remaining sites (i.e., those that were not obviously overblocked) and to make final decisions regarding these sites.

In the first round, each person evaluated two sets of around 80 sites, and each group was evaluated by two different people. Each set of sites included the following instructions:

Look carefully at each of the Web sites on the list. Please make a notation of any site that appears to meet any of the following criteria:

a. Contains information similar to that already found in libraries,

or

b. Contains information a librarian would want in the library if s/he had unlimited funds to purchase information and unlimited shelf space,

or

c. You would be willing to refer a patron (of any age) to the site if the patron appeared at a reference desk seeking information about the subject of the site. For this last criterion, we recognize that you might not refer a young child to a Calculus site just because it would not be useful to that child, but you should ignore that factor. Informational sites, such as a

to the inability of a member of Janes's review team to complete the reviewing process, Janes had to cut 157 Web sites out of the sample, but because the Web sites were randomly assigned to reviewers, it is unlikely that these sites differed significantly from the rest of the sample. That left the sample size at 699, which widened the 95% confidence interval to plus or minus 2.8%.

Of the total 699 sites reviewed, Janes's team concluded that 165 of them, or 23.6% percent of the sample, were not of any value in the library context (i.e., no librarian would, consistent with professional standards, refer a patron to these sites as a source of information). They were unable to find 60 of the Web sites, or 8.6% of the sample. Therefore, they concluded that the remaining 474 Web sites, or 67.8% of the sample, were examples of overblocking with respect to materials that are appropriate sources of information in public libraries.

Calculus site, should be noted. A site that is purely erotica should not be noted.

Sites that received "Yes" votes from both reviewers were determined to be of sufficient interest in a library context and removed from further analysis. Sites receiving one or two "No" votes would go to the next round. In the first round, 243 sites received "Yes" votes from both reviewers, while 456 sites received one or more "No" votes or could not be found. These 456 sites were sent forward to the second round of judging.

The instructions for the second-round reviewers were the same as those given to the first-round reviewers, except that in section c, the following sentence was added: "Sites that have a commercial purpose should be included here if they might be of use or interest to someone wishing to buy the product or service or doing research on commercial behavior on the Internet, much as most libraries include the Yellow Pages in their collections." The second round of review produced the following results: 60 sites could not be found (due to broken links, 404 "not found" errors, domain for sale messages, etc.), 231 sites were judged "Yes," and 165 judged "No."

Applying a 95% confidence interval of plus or minus 2.8%, the study concluded that we can be 95% confident that the actual percentage of sites in the list of 6,775 sites that are appropriate for use in public libraries is somewhere between 65.0% and 70.6%. In other words, we can be 95% certain that the actual number of sites out of the 6,775 that Edelman forwarded to Janes that are appropriate for use in public libraries (under Janes's standard) is somewhere between 4,403 and 4,783.

The government raised some valid criticisms of Janes's methodology, attacking in particular the fact that, while sites that received two "yes" votes in the first round of voting were determined to be of sufficient interest in a library context to be removed from further analysis, sites receiving one or two "no" votes were sent to the next round. The government also correctly points out that results of Janes's study can be generalized only to the population of 6,775 sites that Edelman forwarded to Janes. Even taking these criticisms into account, and discounting Janes's numbers appropriately, we credit Janes's study as confirming that Edelman's set of 6,775 Web sites contains at least a few thousand URLs that were erroneously blocked by one or more of the four filtering programs that he used, whether judged against CIPA's definitions, the filters' own category criteria, or against the standard that the Janes study used. Edelman tested only 500,000 unique URLs out of the 4000 times that many, or two billion, that are estimated to exist in the indexable Web. Even assuming that Edelman chose the URLs that were most likely to be erroneously blocked by commercial filtering programs, we conclude that many times the number of pages that Edelman identified are errone-

ously blocked by one or more of the filtering programs that he tested.

Edelman's and Janes's studies provide numerous specific examples of Web pages that were erroneously blocked by one or more filtering programs. The Web pages that were erroneously blocked by one or more of the filtering programs do not fall into any neat patterns; they range widely in subject matter, and it is difficult to tell why they may have been overblocked. The list that Edelman compiled, for example, contains Web pages relating to religion, politics and government, health, careers, education, travel, sports, and many other topics. In the next section, we provide examples from each of these categories.

6. Examples of Erroneously Blocked Web Sites

Several of the erroneously blocked Web sites had content relating to churches, religious orders, religious charities, and religious fellowship organizations. These included the following Web sites: the Knights of Columbus Council 4828, a Catholic men's group associated with St. Patrick's Church in Fallon, Nevada, *http://msnhomepages.talkcity.com/SpiritSt/kofc4828*, which was blocked by Cyber Patrol in the "Adult/Sexually Explicit" category; the Agape Church of Searcy, Arkansas, *http://www.agapechurch.com*, which was blocked by Websense as "Adult Content"; the home page of the Lesbian and Gay Havurah of the Long Beach, California Jewish Community Center, *http://www.compupix.com/gay/havurah.htm*, which was blocked by N2H2 as "Adults Only, Pornography," by Smartfilter as "Sex," and by Websense as "Sex"; Orphanage Emmanuel, a Christian orphanage in Honduras that houses 225 children, *http://home8.inet.tele.*

dk/rfb5y(2)27viva, which was blocked by Cyber Patrol in the "Adult/Sexually Explicit" category; Vision Art Online, which sells wooden wall hangings for the home that contain prayers, passages from the Bible, and images of the Star of David, *http://www.visionartonline.com*, which was blocked in Websense's "Sex" category; and the home page of Tenzin Palmo, a Buddhist nun, which contained a description of her project to build a Buddhist nunnery and international retreat center for women, *http://www.tenzinpalmo.com*, which was categorized as "Nudity" by N2H2.

Several blocked sites also contained information about governmental entities or specific political candidates, or contained political commentary. These included: the Web site for Kelley Ross, a Libertarian candidate for the California State Assembly, *http://www.friesian.com/ross/ca40*, which N2H2 blocked as "Nudity"; the Web site for Bob Coughlin, a town selectman in Dedham, Massachusetts, *http://www.bobcoughlin.org*, which was blocked under N2H2's "Nudity" category; a list of Web sites containing information about government and politics in Adams County, Pennsylvania, *http://www.geocities.com/adamscopa*, which was blocked by Websense as "Sex"; the Web site for Wisconsin Right to Life, *http://www.wrtl.org*, which N2H2 blocked as "Nudity"; a Web site that promotes federalism in Uganda, *http://federo.com*, which N2H2 blocked as "Adults Only, Pornography"; "Fight the Death Penalty in the USA," a Danish Web site dedicated to criticizing the American system of capital punishment, *http://www.fdp.dk*, which N2H2 blocked as "Pornography"; and "Dumb Laws," a humor Web site that makes fun of outmoded laws,

http://www.dumblaws.com, which N2H2 blocked under its "Sex" category.

Erroneously blocked Web sites relating to health issues included the following: a guide to allergies, *http://www.x-sitez.com/allergy*, which was categorized as "Adults Only, Pornography" by N2H2; a health question and answer site sponsored by Columbia University, *http://www.goaskalice.com.columbia.edu*, which was blocked as "Sex" by N2H2, and as "Mature" by Smartfilter; the Western Amputee Support Alliance Home Page, *http://www.usinter.net/wasa*, which was blocked by N2H2 as "Pornography"; the Web site of the Willis-Knighton Cancer Center, a Shreveport, Louisiana cancer treatment facility, *http://cancerftr.wkmc.com*, which was blocked by Websense under the "Sex" category; and a site dealing with halitosis, *http://www.dreamcastle.com/tungs*, which was blocked by N2H2 as "Adults, Pornography," by Smartfilter as "Sex," by Cyber Patrol as "Adult/Sexually Explicit," and by Websense as "Adult Content."

The filtering programs also erroneously blocked several Web sites having to do with education and careers. The filtering programs blocked two sites that provide information on home schooling. "Hom Edu Station—the Internet Source for Home Education," *http://www.perigee.net/mcmullen/homedu station/*, was categorized by Cyber Patrol as "Adult/Sexually Explicit." Smartfilter blocked "Apricot: A Web site made by and for home schoolers," *http:// apricotpie.com*, as "Sex." The programs also miscategorized several career-related sites. "Social Work Search," *http://www.socialworksearch.com/*, is a directory for social workers that Cyber Patrol placed in its "Adult/Sexually Explicit" category. The "Gay and Lesbian Chamber of

Southern Nevada," *http://www.lambdalv.com*, "a forum for the business community to develop relationships within the Las Vegas lesbian, gay, transsexual, and bisexual community" was blocked by N2H2 as "Adults Only, Pornography." A site for aspiring dentists, *http://www.vvm.com/bond/home.htm*, was blocked by Cyber Patrol in its "Adult/Sexually Explicit" category.

The filtering programs erroneously blocked many travel Web sites, including: the Web site for the Allen Farmhouse Bed & Breakfast of Alleghany County, North Carolina, *http://planet-nc.com/Beth/index.html*, which Websense blocked as "Adult Content"; Odysseus Gay Travel, a travel company serving gay men, *http://www.odyusa.com*, which N2H2 categorized as "Adults Only, Pornography"; Southern Alberta Fly Fishing Outfitters, *http://albertaflyfish.com*, which N2H2 blocked as "Pornography"; and "Nature and Culture Conscious Travel," a tour operator in Namibia, *http://www.trans-namibia-tours.com*, which was categorized as "Pornography" by N2H2.

The filtering programs also miscategorized a large number of sports Web sites. These included: a site devoted to Willie O'Ree, the first African American player in the National Hockey League, *http://www. missioncreep.com/mw/oree.html*, which Websense blocked under its "Nudity" category; the home page of the Sydney University Australian Football Club, *http://www.tek.com.au/suafc*, which N2H2 blocked as "Adults Only, Pornography," Smartfilter blocked as "Sex," Cyber Patrol blocked as "Adult/Sexually Explicit" and Websense blocked as "Sex"; and a fan's page devoted to the Toronto Maple Leafs hockey team, *http://www.torontomapleleafs.atmypage.com*, which N2H2 blocked under the "Pornography" category.

7. Conclusion: The Effectiveness of Filtering Programs

Public libraries have adopted a variety of means of dealing with problems created by the provision of Internet access. The large amount of sexually explicit speech that is freely available on the Internet has, to varying degrees, led to patron complaints about such matters as unsought exposure to offensive material, incidents of staff and patron harassment by individuals viewing sexually explicit content on the Internet, and the use of library computers to access illegal material, such as child pornography. In some libraries, youthful library patrons have persistently attempted to use the Internet to access hardcore pornography.

Those public libraries that have responded to these problems by using software filters have found such filters to provide a relatively effective means of preventing patrons from accessing sexually explicit material on the Internet. Nonetheless, out of the entire universe of speech on the Internet falling within the filtering products' category definitions, the filters will incorrectly fail to block a substantial amount of speech. Thus, software filters have not completely eliminated the problems that public libraries have sought to address by using the filters, as evidenced by frequent instances of underblocking. Nor is there any quantitative evidence of the relative effectiveness of filters and the alternatives to filters that are also intended to prevent patrons from accessing illegal content on the Internet.

Even more importantly (for this case), although software filters provide a relatively cheap and effective, albeit imperfect, means for public libraries to prevent patrons from accessing speech that falls within the

filters' category definitions, we find that commercially available filtering programs erroneously block a huge amount of speech that is protected by the First Amendment. Any currently available filtering product that is reasonably effective in preventing users from accessing content within the filter's category definitions will necessarily block countless thousands of Web pages, the content of which does not match the filtering company's category definitions, much less the legal definitions of obscenity, child pornography, or harmful to minors. Even Finnell, an expert witness for the defendants, found that between 6% and 15% of the blocked Web sites in the public libraries that he analyzed did not contain content that meets even the filtering products' own definitions of sexually explicit content, let alone CIPA's definitions.

This phenomenon occurs for a number of reasons explicated in the more detailed findings of fact *supra*. These include limitations on filtering companies' ability to: (1) harvest Web pages for review; (2) review and categorize the Web pages that they have harvested; and (3) engage in regular re-review of the Web pages that they have previously reviewed. The primary limitations on filtering companies' ability to harvest Web pages for review is that a substantial majority of pages on the Web are not indexable using the spidering technology that Web search engines use, and that together, search engines have indexed only around half of the Web pages that are theoretically indexable. The fast rate of growth in the number of Web pages also limits filtering companies' ability to harvest pages for review. These shortcomings necessarily result in significant underblocking.

Several limitations on filtering companies' ability to review and categorize the Web pages that they have harvested also contribute to over- and underblocking. First, automated review processes, even those based on "artificial intelligence," are unable with any consistency to distinguish accurately material that falls within a category definition from material that does not. Moreover, human review of URLs is hampered by filtering companies' limited staff sizes, and by human error or misjudgment. In order to deal with the vast size of the Web and its rapid rates of growth and change, filtering companies engage in several practices that are necessary to reduce underblocking, but inevitably result in overblocking. These include: (1) blocking whole Web sites even when only a small minority of their pages contain material that would fit under one of the filtering company's categories (e.g., blocking the Salon.com site because it contains a sex column); (2) blocking by IP address (because a single IP address may contain many different Web sites and many thousands of pages of heterogenous content); and (3) blocking loophole sites such as translator sites and cache sites, which archive Web pages that have been removed from the Web by their original publisher.

Finally, filtering companies' failure to engage in regular re-review of Web pages that they have already categorized (or that they have determined do not fall into any category) results in a substantial amount of over- and underblocking. For example, Web publishers change the contents of Web pages frequently. The problem also arises when a Web site goes out of existence and its domain name or IP address is reassigned to a new Web site publisher. In that case, a filtering company's previous categorization of the IP address or

domain name would likely be incorrect, potentially resulting in the over- or underblocking of many thousands of pages.

The inaccuracies that result from these limitations of filtering technology are quite substantial. At least tens of thousands of pages of the indexable Web are overblocked by each of the filtering programs evaluated by experts in this case, even when considered against the filtering companies' own category definitions. Many erroneously blocked pages contain content that is completely innocuous for both adults and minors, and that no rational person could conclude matches the filtering companies' category definitions, such as "pornography" or "sex."

The number of overblocked sites is of course much higher with respect to the definitions of obscenity and child pornography that CIPA employs for adults, since the filtering products' category definitions, such as "sex" and "nudity," encompass vast amounts of Web pages that are neither child pornography nor obscene. Thus, the number of pages of constitutionally protected speech blocked by filtering products far exceeds the many thousands of pages that are overblocked by reference to the filtering products' category definitions.

No presently conceivable technology can make the judgments necessary to determine whether a visual depiction fits the legal definitions of obscenity, child pornography, or harmful to minors. Given the state of the art in filtering and image recognition technology, and the rapidly changing and expanding nature of the Web, we find that filtering products' shortcomings will not be solved through a technical solution in the fore-

seeable future.[19] In sum, filtering products are currently unable to block only visual depictions that are obscene, child pornography, or harmful to minors (or, only content matching a filtering product's category definitions) while simultaneously allowing access to all protected speech (or, all content not matching the blocking product's category definitions). Any software filter that is reasonably effective in blocking access to Web pages that fall within its category definitions will necessarily erroneously block a substantial number of Web pages that do not fall within its category definitions.

III. Analytic Framework for the Opinion: The Centrality of *Dole* and the Role of the Facial Challenge

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[19] Although it was not proffered as evidence in this trial, (and hence we do not rely on it to inform our findings), we note that *Youth, Pornography, and the Internet*, a congressionally commissioned study by the National Research Council, a division of the National Academies of Science, *see* Pub. L. No. 105-314, Title X, Sec. 901, comes to a conclusion similar to the one that we reach regarding the effectiveness of Internet filters. The commission concludes that:

> All filters—those of today and for the foreseeable future—suffer (and will suffer) from some degree of overblocking (blocking content that should be allowed through) and some degree of underblocking (passing content that should not be allowed through). While the extent of overblocking and underblocking will vary with the product (and may improve over time), underblocking and overblocking result from numerous sources, including the variability in the perspectives that humans bring to the task of judging content. *Youth, Pornography, and the Internet* (Dick Thornburgh & Herbert S. Lin, eds., 2002), *available at http://bob.nap.edu/html/youth—internet/.*

Both the plaintiffs and the government agree that, because this case involves a challenge to the constitutionality of the conditions that Congress has set on state actors' receipt of federal funds, the Supreme Court's decision in *South Dakota v. Dole*, 483 U.S. 203, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987), supplies the proper threshold analytic framework. The constitutional source of Congress's spending power is Article I, § 8, cl. 1, which provides that "Congress shall have Power . . . to pay the Debts and provide for the common Defence and general Welfare of the United States." In *Dole*, the Court upheld the constitutionality of a federal statute requiring the withholding of federal highway funds from any state with a drinking age below 21. *Id.* at 211-12, 107 S. Ct. 2793. In sustaining the provision's constitutionality, *Dole* articulated four general constitutional limitations on Congress's exercise of the spending power.

First, "the exercise of the spending power must be in pursuit of 'the general welfare.'" *Id.* at 207, 107 S. Ct. 2793. Second, any conditions that Congress sets on states' receipt of federal funds must be sufficiently clear to enable recipients "to exercise their choice knowingly, cognizant of the consequences of their participation." *Id.* (internal quotation marks and citation omitted). Third, the conditions on the receipt of federal funds must bear some relation to the purpose of the funding program. *Id.* And finally, "other constitutional provisions may provide an independent bar to the conditional grant of federal funds." *Id.* at 208, 107 S. Ct. 2793. In particular, the spending power "may not be used to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously

discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power." *Id.* at 210, 107 S. Ct. 2793.

Plaintiffs do not contend that CIPA runs afoul of the first three limitations. However, they do allege that CIPA is unconstitutional under the fourth prong of *Dole* because it will induce public libraries to violate the First Amendment.[20] Plaintiffs therefore submit that the First Amendment "provide[s] an independent bar to the conditional grant of federal funds" created by CIPA. *Id.* at 208, 107 S. Ct. 2793. More specifically, they argue that by conditioning public libraries' receipt of federal funds on the use of software filters, CIPA will induce public libraries to violate the First Amendment rights of Internet content-providers to disseminate constitutionally protected speech to library patrons via the Internet, and the correlative First Amendment rights of public library patrons to receive constitutionally protected speech on the Internet.[21]

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[20] Because we find that the plaintiff public libraries are funded and controlled by state and local governments, they are state actors, subject to the constraints of the First Amendment, as incorporated by the Due Process Clause of the Fourteenth Amendment.

[21] The Supreme Court has recognized that the First Amendment encompasses not only the right to speak, but also the right to receive information. *See Reno v. ACLU*, 521 U.S. 844, 874, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997) (invalidating a statute because it "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another"); *Stanley v. Georgia*, 394 U.S. 557, 564, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969) ("[The] right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society."); *see also Bd. of Educ. v. Pico*, 457 U.S. 853, 867-68, 102 S. Ct. 2799, 73 L. Ed. 2d 435 (1982) (plurality opinion) ("[T]he right to receive ideas follows ineluctably from the *sende'sr* [*sic*] First Amendment right to send them.").

The government concedes that under the *Dole* framework, CIPA is facially invalid if its conditions will induce public libraries to violate the First Amendment. The government and the plaintiffs disagree, however, on the meaning of *Dole's* "inducement" requirement in the context of a First Amendment facial challenge to the conditions that Congress places on state actors' receipt of federal funds. The government contends that because plaintiffs are bringing a facial challenge, they must show that under no circumstances is it possible for a public library to comply with CIPA's conditions without violating the First Amendment. The plaintiffs respond that even if it is possible for some public libraries to comply with CIPA without violating the First Amendment, CIPA is facially invalid if it "will result in the impermissible suppression of a substantial amount of protected speech."

Because it was clear in *Dole* that the states could comply with the challenged conditions that Congress attached to the receipt of federal funds without violating the Constitution, the *Dole* Court did not have occasion to explain fully what it means for Congress to use the spending power to "induce [recipients] to engage in activities that would themselves be unconstitutional." *Dole*, 483 U.S. at 210, 107 S. Ct. 2793; *see id.* at 211, 107 S. Ct. 2793 ("Were South Dakota to succumb to the blandishments offered by Congress and raise its drinking age to 21, the State's action in so doing would not violate the constitutional rights of anyone."). Although the proposition that Congress may not pay state actors to violate citizens' First Amendment rights

is unexceptionable when stated in the abstract, it is unclear what exactly a litigant must establish to facially invalidate an exercise of Congress's spending power on this ground.

In general, it is well-established that a court may sustain a facial challenge to a statute only if the plaintiff demonstrates that the statute admits of no constitutional application. *See United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."); *see also Bowen v. Kendrick*, 487 U.S. 589, 612, 108 S. Ct. 2562, 101 L. Ed. 2d 520 (1988) ("It has not been the Court's practice, in considering facial challenges to statutes of this kind, to strike them down in anticipation that particular applications may result in unconstitutional use of funds.") (internal quotation marks and citation omitted).

First Amendment overbreadth doctrine creates a limited exception to this rule by permitting facial invalidation of a statute that burdens a substantial amount of protected speech, even if the statute may be constitutionally applied in particular circumstances. "The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere. Under this principle, [a law] is unconstitutional on its face if it prohibits a substantial amount of protected expression." *Ashcroft v. Free Speech Coalition*, —— U.S. ——, ——, 122 S. Ct. 1389, 1399, 152 L.Ed.2d 403, —— (2002); *see also Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973). This more

liberal test of a statute's facial validity under the First Amendment stems from the recognition that where a statute's reach contemplates a number of both constitutional and unconstitutional applications, the law's sanctions may deter individuals from challenging the law's validity by engaging in constitutionally protected speech that may nonetheless be proscribed by the law. Without an overbreadth doctrine, "the contours of regulation would have to be hammered out case by case—and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation." *Dombrowski v. Pfister*, 380 U.S. 479, 487, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965); *see also Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985) ("[A]n individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.").

Plaintiffs argue that the overbreadth doctrine is applicable here, since CIPA "threatens to chill free speech—because it will censor a substantial amount of protected speech, because it is vague, and because the law creates a prior restraint. . . ." Unlike the statutes typically challenged as facially overbroad, however, CIPA does not impose criminal penalties on those who violate its conditions. *Cf. Free Speech Coalition*, —— U.S. at ——, 122 S. Ct. at 1398 ("With these severe penalties in force, few legitimate movie producers or book publishers, or few other speakers in any capacity, would risk distributing images in or near the uncertain

reach of this law."). Thus, the rationale for permitting facial challenges to laws that may be constitutionally applied in some instances is less compelling in cases such as this, which involve challenges to Congress's exercise of the spending power, than in challenges to criminal statutes.

Nonetheless, "even minor punishments can chill protected speech," *id.*, and absent the ability to challenge CIPA on its face, public libraries that depend on federal funds may decide to comply with CIPA's terms, thereby denying patrons access to substantial amounts of constitutionally protected speech, rather than refusing to comply with CIPA's terms and consequently losing the benefits of federal funds. *See* 47 C.F.R. § 54.520(e)(1) ("A school or library that knowingly fails to ensure the use of computers in accordance with the certifications required by this section, must reimburse any funds and discounts received under the federal universal support service support mechanism for schools and libraries for the period in which there was noncompliance."). Even in cases where the only penalty for failure to comply with a statute is the withholding of federal funds, the Court has sustained facial challenges to Congress's exercise of the spending power. *See, e.g., Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001) (declaring unconstitutional on its face a federal statute restricting the ability of legal services providers who receive federal funds to engage in activity protected by the First Amendment).

The Court's unconstitutional conditions cases, such as *Velazquez*, are not strictly controlling, since they do not require a showing that recipients who comply with the conditions attached to federal funding will, as state actors, violate others' constitutional rights, as is the

case under the fourth prong of *Dole*. However, they are highly instructive.

The Supreme Court's pronouncements in the unconstitutional conditions cases on what is necessary for a plaintiff to mount a successful First Amendment facial challenge to an exercise of Congress's spending power have not produced a seamless web. For example, in *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991), the Court rejected a First Amendment facial challenge to federal regulations prohibiting federally funded healthcare clinics from providing counseling concerning the use of abortion as a method of family planning, explaining that:

> Petitioners are challenging the *facial* validity of the regulations. Thus, we are concerned only with the question whether, on their face, the regulations are both authorized by the Act and can be construed in such a manner that they can be applied to a set of individuals without infringing upon constitutionally protected rights. Petitioners face a heavy burden in seeking to have the regulations invalidated as facially unconstitutional. . . . The fact that the regulations might operate unconstitutionally under some conceivable set of circumstances is insufficient to render them wholly invalid.

Id. at 183, 111 S. Ct. 1759 (internal quotation marks, alterations, and citation omitted). In contrast, *NEA v. Finley*, 524 U.S. 569, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998), which also involved a facial First Amendment challenge to an exercise of Congress's spending power, articulated a somewhat more liberal test of facial validity than *Rust*, explaining that "[t]o prevail, respondents must demonstrate a substantial risk that application of

the provision will lead to the suppression of speech." *Id.* at 580, 118 S. Ct. 2168.

Against this background, it is unclear to us whether, to succeed in facially invalidating CIPA on the grounds that it will "induce the States to engage in activities that would themselves be unconstitutional," *Dole*, 483 U.S. at 210, 107 S. Ct. 2793, plaintiffs must show that it is impossible for public libraries to comply with CIPA's conditions without violating the First Amendment, or rather simply that CIPA will effectively restrict library patrons' access to substantial amounts of constitutionally protected speech, therefore causing many libraries to violate the First Amendment. However, we need not resolve this issue. Rather, we may assume without deciding, for purposes of this case, that a facial challenge to CIPA requires plaintiffs to show that any public library that complies with CIPA's conditions will necessarily violate the First Amendment and, as explained in detail below, we believe that CIPA's constitutionality fails even under this more restrictive test of facial validity urged on us by the government. Because of the inherent limitations in filtering technology, public libraries can never comply with CIPA without blocking access to a substantial amount of speech that is both constitutionally protected and fails to meet even the filtering companies' own blocking criteria. We turn first to the governing legal principles to be applied to the facts in order to determine whether the First Amendment permits a library to use the filtering technology mandated by CIPA.

IV. Level of Scrutiny Applicable to Content-based Restrictions on Internet Access in Public Libraries

In analyzing the constitutionality of a public library's use of Internet filtering software, we must first identify the appropriate level of scrutiny to apply to this restriction on patrons' access to speech. While plaintiffs argue that a public library's use of such filters is subject to strict scrutiny, the government maintains that the applicable standard is rational basis review. If strict scrutiny applies, the government must show that the challenged restriction on speech is narrowly tailored to promote a compelling government interest and that no less restrictive alternative would further that interest. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000). In contrast, under rational basis review, the challenged restriction need only be reasonable; the government interest that the restriction serves need not be compelling; the restriction need not be narrowly tailored to serve that interest; and the restriction "need not be the most reasonable or the only reasonable limitation." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 808, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985).

Software filters, by definition, block access to speech on the basis of its content, and content-based restrictions on speech are generally subject to strict scrutiny. *See Playboy*, 529 U.S. at 813, 120 S. Ct. 1878 ("[A] content-based speech restriction . . . can stand only if it satisfies strict scrutiny."). Strict scrutiny does not necessarily apply to content-based restrictions on speech, however, where the restrictions apply only to speech on government property, such as public libraries. "[I]t is . . . well settled that the government need

not permit all forms of speech on property that it owns and controls." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). We perforce turn to a discussion of public forum doctrine.

A. Overview of Public Forum Doctrine

The government's power to restrict speech on its own property is not unlimited. Rather, under public forum doctrine, the extent to which the First Amendment permits the government to restrict speech on its own property depends on the character of the forum that the government has created. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985). Thus, the First Amendment affords greater deference to restrictions on speech in those areas considered less amenable to free expression, such as military bases, *see Greer v. Spock*, 424 U.S. 828, 96 S. Ct. 1211, 47 L. Ed. 2d 505 (1976), jail grounds, *see Adderley v. Florida*, 385 U.S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149 (1966), or public airport terminals, *see Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992), than to restrictions on speech in state universities, *see Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995), or streets, sidewalks and public parks, *see Frisby v. Schultz*, 487 U.S. 474, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988); *Hague v. CIO*, 307 U.S. 496, 59 S. Ct. 954, 83 L.Ed. 1423 (1939).

The Supreme Court has identified three types of fora for purposes of identifying the level of First Amendment scrutiny applicable to content-based restrictions on speech on government property: traditional public fora, designated public fora, and nonpublic fora.

Traditional public fora include sidewalks, squares, and public parks:

> [S]treets and parks . . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Hague, 307 U.S. at 515, 59 S.Ct. 954. "In these quintessential public forums, . . . [f]or the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educs. Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983); *see also Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 678, 112 S. Ct. 2701 ("[R]egulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny."); *Frisby*, 487 U.S. at 480, 108 S. Ct. 2495 ("[W]e have repeatedly referred to public streets as the archetype of a traditional public forum.").

A second category of fora, known as designated (or limited) public fora, "consists of public property which the State has opened for use by the public as a place for expressive activity." *Perry*, 460 U.S. at 46, 103 S. Ct. 948. Whereas any content-based restriction on the use of traditional public fora is subject to strict scrutiny, the state is generally permitted, as long as it does not discriminate on the basis of viewpoint, to limit a designated public forum to certain speakers or the dis-

cussion of certain subjects. *See Perry*, 460 U.S. at 45 n.7, 103 S. Ct. 948. Once it has defined the limits of a designated public forum, however, "[r]egulation of such property is subject to the same limitations as that governing a traditional public forum." *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 678, 112 S. Ct. 2701. Examples of designated fora include university meeting facilities, *see Widmar v. Vincent*, 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981), school board meetings, *see City of Madison Joint School Dist. v. Wisc. Employment Relations Comm'n*, 429 U.S. 167, 97 S. Ct. 421, 50 L. Ed. 2d 376 (1976), and municipal theaters, *see Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975).

The third category, nonpublic fora, consists of all remaining public property. "Limitations on expressive activity conducted on this last category of property must survive only a much more limited review. The challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 679, 112 S. Ct. 2701.

B. Contours of the Relevant Forum: the Library's Collection as a Whole or the Provision of Internet Access?

To apply public forum doctrine to this case, we must first determine whether the appropriate forum for analysis is the library's collection as a whole, which includes both print and electronic resources, or the library's provision of Internet access. Where a plaintiff seeks limited access, for expressive purposes, to governmentally controlled property, the Supreme Court has held that the relevant forum is defined not by the

physical limits of the government property at issue, but rather by the specific access that the plaintiff seeks:

> Although . . . as an initial matter a speaker must seek access to public property or to private property dedicated to public use to evoke First Amendment concerns, forum analysis is not completed merely by identifying the government property at issue. Rather, in defining the forum we have focused on the access sought by the speaker. When speakers seek general access to public property, the forum encompasses that property. In cases in which limited access is sought, our cases have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property.

Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 801, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985).

Thus, in *Cornelius*, where the plaintiffs were legal defense and political advocacy groups seeking to participate in the Combined Federal Campaign charity drive, the Court held that the relevant forum, for First Amendment purposes, was not the entire federal workplace, but rather the charity drive itself. *Id.* at 801, 105 S. Ct. 3439. Similarly, in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983), which addressed a union's right to access a public school's internal mail system and teachers' mailboxes, the Court identified the relevant forum as the school's mail system, not the public school as a whole. In *Widmar v. Vincent*, 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981), in which a student group challenged a state

university's restrictions on use of its meeting facilities, the Court identified the relevant forum as the meeting facilities to which the plaintiffs sought access, not the state university generally. And in *Christ's Bride Ministries, Inc. v. SEPTA*, 148 F.3d 242 (3d Cir. 1998), involving a First Amendment challenge to the removal of advertisements from subway and commuter rail stations, the Third Circuit noted that the forum at issue was not the rail and subway stations as a whole, but rather the advertising space within the stations. *Id.* at 248. Although these cases dealt with the problem of identifying the relevant forum where *speakers* are claiming a right of access, we believe that the same approach applies to identifying the relevant forum where the parties seeking access are listeners or readers.

In this case, the patron plaintiffs are not asserting a First Amendment right to compel public libraries to acquire certain books or magazines for their print collections. Nor are the Web site plaintiffs claiming a First Amendment right to compel public libraries to carry print materials that they publish. Rather, the right at issue in this case is the specific right of library patrons to access information on the Internet, and the specific right of Web publishers to provide library patrons with information via the Internet. Thus, the relevant forum for analysis is not the library's entire collection, which includes both print and electronic media, such as the Internet, but rather the specific forum created when the library provides its patrons with Internet access.

Although a public library's provision of Internet access does not resemble the conventional notion of a forum as a well-defined physical space, the same First Amendment standards apply. *See Rosenberger v.*

Rector & Visitors of Univ. of Va., 515 U.S. 819, 830, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995) (holding that a state university's student activities fund "is a forum more in a metaphysical than a spatial or geographic sense, but the same principles are applicable"); *see also Cornelius*, 473 U.S. at 801, 105 S. Ct. 3439 (identifying the Combined Federal Campaign charity drive as the relevant unit of analysis for application of public forum doctrine).

C. Content-based Restrictions in Designated Public Fora

Unlike nonpublic fora such as airport terminals, *see Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992), military bases, *see Greer v. Spock*, 424 U.S. 828, 96 S. Ct. 1211, 47 L. Ed. 2d 505 (1976), jail grounds, *see Adderley v. Florida*, 385 U.S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149 (1966), the federal workplace, *see Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 805, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985), and public transit vehicles, *see Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S. Ct. 2714, 41 L. Ed. 2d 770 (1974), the purpose of a public library in general, and the provision of Internet access within a public library in particular, is "for use by the public . . . for expressive activity," *Perry Educ. Ass'n v. Perry Local Educs. Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983), namely, the dissemination and receipt by the public of a wide range of information. We are satisfied that when the government provides Internet access in a public library, it has created a designated public forum. *See Mainstream Loudoun v. Bd. of Trustees of the Loudoun County Library*, 24 F. Supp. 2d 552, 563 (E. D. Va. 1998); *cf. Kreimer v. Bureau of Police*, 958 F.2d 1242,

1259 (3d Cir. 1992) (holding that a public library is a limited public forum).

Relying on those cases that have recognized that government has leeway, under the First Amendment, to limit use of a designated public forum to narrowly specified purposes, and that content-based restrictions on speech that are consistent with those purposes are subject only to rational basis review, the government argues for application of rational basis review to public libraries' decisions about which content to make available to their patrons via the Internet. *See Rosenberger*, 515 U.S. 819, 829, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995) ("The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics."); *Perry*, 460 U.S. at 46 n.7, 103 S. Ct. 948 (1983) ("A public forum may be created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects.").

In particular, the government forcefully argues that a public library's decision to limit the content of its digital offerings on the Internet should be subject to no stricter scrutiny than its decisions about what content to make available to its patrons through the library's print collection. According to the government, just as a public library may choose to acquire books about gardening but not golf, without having to show that this content-based restriction on patrons' access to speech is narrowly tailored to further a compelling state interest, so may a public library make content-based decisions about which speech to make available on the Internet, without having to show that such a restriction satisfies strict scrutiny.

Plaintiffs respond that the government's ability to restrict the content of speech in a designated public forum by restricting the purpose of the designated public forum that it creates is not unlimited. *Cf. Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001) ("Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise."). As Justice Kennedy has explained:

> If Government has a freer hand to draw content-based distinctions in limiting a forum than in excluding someone from it, the First Amendment would be a dead letter in designated public forums; every exclusion could be recast as a limitation. . . . The power to limit or redefine forums for a specific legitimate purpose does not allow the government to exclude certain speech or speakers from them for any reason at all.

Denver Area Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 801, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (1996) (Kennedy, J., concurring in the judgment).

Although we agree with plaintiffs that the First Amendment imposes some limits on the state's ability to adopt content-based restrictions in defining the purpose of a public forum, precisely what those limits are is unclear, and presents a difficult problem in First Amendment jurisprudence. The Supreme Court's "cases have not yet determined . . . that government's decision to dedicate a public forum to one type of content or another is necessarily subject to the highest level of scrutiny. Must a local government, for example, show a compelling state interest if it builds a band shell

in the park and dedicates it solely to classical music (but not to jazz)? The answer is not obvious." *Denver*, 518 U.S. at 750, 116 S. Ct. 2374 (plurality opinion); *see also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 572-73, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975) (Rehnquist, J., dissenting) ("May an opera house limit its productions to operas, or must it also show rock musicals? May a municipal theater devote an entire season to Shakespeare, or is it required to book any potential producer on a first come, first served basis?").

We believe, however, that certain principles emerge from the Supreme Court's jurisprudence on this question. In particular, and perhaps somewhat counterintuitively, the more narrow the range of speech that the government chooses to subsidize (whether directly, through government grants or other funding, or indirectly, through the creation of a public forum) the more deference the First Amendment accords the government in drawing content-based distinctions.

At one extreme lies the government's decision to fund a particular message that the government seeks to disseminate. In this context, content-based restrictions on the speech that government chooses to subsidize are clearly subject to at most rational basis review, and even viewpoint discrimination is permissible. For example, "[w]hen Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, 22 U.S.C. § 4411(b), it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism." *Rust v. Sullivan*, 500 U.S. 173, 194, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991); *see also Velazquez*, 531 U.S. at 541, 121 S. Ct. 1043 ("[V]iewpoint-based funding decisions can be sustained

in instances in which the government is itself the speaker, or in instances, like *Rust*, in which the government used private speakers to transmit information pertaining to its own program.") (internal quotation marks and citation omitted).

Although not strictly controlling, the Supreme Court's unconstitutional conditions cases, such as *Rust* and *Velazquez*, are instructive for purposes of analyzing content-based restrictions on the use of public fora. This is because the limitations that government places on the use of a public forum can be conceptualized as conditions that the government attaches to the receipt of a benefit that it offers, namely, the use of government property. Public forum cases thus resemble those unconstitutional conditions cases involving First Amendment challenges to the conditions that the state places on the receipt of a government benefit. *See Velazquez*, 531 U.S. at 544, 121 S. Ct. 1043 ("As this suit involves a subsidy, limited forum cases . . . may not be controlling in the strict sense, yet they do provide some instruction.").

Even when the government does not fund the dissemination of a particular government message, the First Amendment generally permits government, subject to the constraints of viewpoint neutrality, to create public institutions such as art museums and state universities, dedicated to facilitating the dissemination of private speech that the government believes to have particular merit. Thus, in *NEA v. Finley*, 524 U.S. 569, 118 S. Ct. 2168, 141 L. Ed .2d 500 (1998), the Court upheld the use of content-based restrictions in a federal program awarding grants to artists on the basis of, *inter alia*, artistic excellence. "The very assumption of the NEA is that grants will be awarded according to

the artistic worth of competing applications, and absolute neutrality is simply inconceivable." *Id.* at 585, 118 S. Ct. 2168 (internal quotation marks and citation omitted).

Similarly, as Justice Stevens explained in his concurring opinion in *Widmar v. Vincent*, 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981), the First Amendment does not necessarily subject to strict scrutiny a state university's use of content-based means of allocating scarce resources, including limited public fora such as its meeting facilities:

> Because every university's resources are limited, an educational institution must routinely make decisions concerning the use of the time and space that is available for extracurricular activities. In my judgment, it is both necessary and appropriate for those decisions to evaluate the content of a proposed student activity. I should think it obvious, for example, that if two groups of 25 students requested the use of a room at a particular time—one to view Mickey Mouse cartoons and the other to rehearse an amateur performance of Hamlet—the First Amendment would not require that the room be reserved for the group that submitted its application first. Nor do I see why a university should have to establish a "compelling state interest" to defend its decision to permit one group to use the facility and not the other.

Id. at 278, 102 S. Ct. 269 (Stevens, J., concurring in the judgment).[22]

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[22] Indeed, if the First Amendment subjected to strict scrutiny the government's decision to dedicate a forum to speech whose

The more broadly the government facilitates private speech, however, the less deference the First Amendment accords to the government's content-based restrictions on the speech that it facilitates. Thus, where the government creates a designated public forum to facilitate private speech representing a diverse range of viewpoints, the government's decision selectively to single out particular viewpoints for exclusion is subject to strict scrutiny. *Compare Rosenberger*, 515 U.S. at 834, 115 S. Ct. 2510 (applying heightened First Amendment scrutiny to viewpoint-based restrictions on the use of a limited public forum where the government

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content the government judges to be particularly valuable, many of our public institutions of culture would cease to exist in their current form:

> From here on out, the National Gallery in Washington, D.C., for example, would be required to display the art of all would-be artists on a first-come-first-served basis and would not be able to exercise any content control over its collection through evaluations of quality. Such a conclusion, of course, strikes us as absurd, but that is only because we feel that the government should be free to establish public cultural institutions guided by standards such as "quality."
>
> . . . . . .
>
> While the First Amendment articulates a deep fear of government intervention in the marketplace of ideas (because of the risk of distortion), it also seems prepared to permit state—sponsored and supported cultural institutions that exercise considerable control over which art to fund, which pictures to hang, and which courses to teach. That these choices necessarily involve judgments about favored and disfavored content—judgments clearly prohibited in the realm of censorship—is indisputable.

Lee C. Bollinger, *Public Institutions of Culture and the First Amendment: The New Frontier*, 63 U. Cin. L. Rev. 1103, 1110-15 (1995).

"does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers"), *with Finley*, 524 U.S. at 586, 118 S. Ct. 2168 ("In the context of arts funding, in contrast to many other subsidies, the Government does not indiscriminately encourage a diversity of views from private speakers.") (internal quotation marks and citation omitted).

Similarly, although the government may create a designated public forum limited to speech on a particular topic, if the government opens the forum to members of the general public to speak on that topic while selectively singling out for exclusion particular speakers on the basis of the content of their speech, that restriction is subject to strict scrutiny. For instance, in *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 97 S. Ct. 421, 50 L. Ed. 2d 376 (1976), the Court held that where a school board opens its meetings for public participation, it may not, consistent with the First Amendment, prohibit teachers other than union representatives from speaking on the subject of pending collective-bargaining negotiations. *See id.* at 175, 97 S. Ct. 421 (noting that the state "has opened a forum for direct citizen involvement"); *see also Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 680, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998) (distinguishing, for purposes of determining the appropriate level of First Amendment scrutiny, a televised debate in which a public broadcasting station exercises editorial discretion in selecting participating candidates from a debate that has "an open-microphone format").

Finally, content-based restrictions on speech in a designated public forum are most clearly subject to

strict scrutiny when the government opens a forum for virtually unrestricted use by the general public for speech on a virtually unrestricted range of topics, while selectively excluding particular speech whose content it disfavors. Thus, in *Conrad*, the Court held that a local government violated the First Amendment when it denied a group seeking to perform the rock musical "Hair" access to a general-purpose municipal theater open for the public at large to use for performances. *See also Denver*, 518 U.S. at 802, 116 S. Ct. 2374 (Kennedy, J., concurring in the judgment) (suggesting that strict scrutiny would not apply to a local government's decision to "build[] a band shell in the park and dedicate[] it solely to classical music (but not jazz)," but would apply to "the Government's creation of a band shell in which all types of music might be performed except for rap music").

Similarly, in *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984), the Court subjected to heightened scrutiny a federal program that funded a wide range of public broadcasting stations that disseminated speech on a wide range of subjects, where the federal program singled out for exclusion speech whose content amounted to editorializing. As the Court later explained:

> In *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984) the Court was instructed by its understanding of the dynamics of the broadcast industry in holding that prohibitions against editorializing by public radio networks were an impermissible restriction, even though the Government enacted the restriction to control the use of public funds. The First Amendment forbade the Government from using the forum

in an unconventional way to suppress speech inherent in the nature of the medium.

Velazquez, 531 U.S. at 543, 121 S.Ct. 1043.

In sum, the more widely the state opens a forum for members of the public to speak on a variety of subjects and viewpoints, the more vulnerable is the state's decision selectively to exclude certain speech on the basis of its disfavored content, as such exclusions distort the marketplace of ideas that the state has created in establishing the forum. *Cf. Velazquez*, 531 U.S. at 544, 121 S. Ct. 1043 ("Restricting LSC attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys in much the same way broadcast systems or student publication networks were changed in the limited forum cases. . . .").

Thus, we believe that where the state designates a forum for expressive activity and opens the forum for speech by the public at large on a wide range of topics, strict scrutiny applies to restrictions that single out for exclusion from the forum particular speech whose content is disfavored. "Laws designed or intended to suppress or restrict the expression of *specific* speakers contradict basic First Amendment principles." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 812, 120 S. Ct. 1878, 146 L .Ed. 2d 865 (2000); *see also Denver*, 518 U.S. at 782, 116 S. Ct. 2374 (Kennedy, J., concurring in the judgment) (noting the flaw in a law that "singles out one sort of speech for vulnerability to private censorship in a context where content-based discrimination is not otherwise permitted"). *Compare Forbes*, 523 U.S. at 679, 118 S. Ct. 1633 (holding that the state does not create a public forum when it "allows

selective *access* for individual speakers rather than general access for a class of speakers") (emphasis added), *with Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 96, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972) ("Selective *exclusions* from a public forum may not be based on content alone, and may not be justified by reference to content alone.") (emphasis added).

We note further that to the extent that the government creates a public forum expressly designed to facilitate the dissemination of private speech, opens the forum to any member of the public to speak on any [*sic*] virtually any topic, and then selectively targets certain speech for exclusion based on its content, the government is singling out speech in a manner that resembles the discriminatory taxes on the press that the Supreme Court subjected to heightened First Amendment scrutiny in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S. Ct. 1722, 95 L. Ed. 2d 209 (1987), and *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983), which we explain in the margin.[23]

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[23] In both of these cases, the taxation scheme at issue effectively subsidized a vast range of publications, and singled out for penalty only a handful of speakers. *See Arkansas Writers' Project*, 481 U.S. at 228-29, 107 S. Ct. 1722 (noting that "selective taxation of the press—. . . [by] targeting individual members of the press—poses a particular danger of abuse by the State" and explaining that "this case involves a more disturbing use of selective taxation than *Minneapolis Star*, because the basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its *content* "); *Minneapolis Star*, 460 U.S. at 591, 103 S. Ct. 1365 ("Minnesota's ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a

D. Reasons for Applying Strict Scrutiny

1. Selective Exclusion From a "Vast Democratic Forum"

Applying these principles to public libraries, we agree with the government that generally the First Amendment subjects libraries' content-based decisions about which print materials to acquire for their collections to only rational review. In making these decisions, public libraries are generally free to adopt collection development criteria that reflect not simply patrons' demand for certain material, but also the library's evaluation of the material's quality. *See* Bernard W. Bell, *Filth, Filtering, and the First Amendment: Ruminations on Public Libraries' Use of Internet Filtering Software*, 53 Fed. Comm. L. J. 191, 225 (2001) ("Librarians should have the discretion to decide that the library is committed to intellectual inquiry, not to the satisfaction of the full range of human desires."). Thus, a public library's decision to use the last $100 of its budget to purchase the complete works of Shakespeare even though more of its patrons would prefer the library to use the same amount to purchase the complete works of John Grisham, is not, in our view, subject to strict scrutiny. *Cf. NEA v. Finley*, 524 U.S. 569, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998) (subjecting only to rational basis review the government's decision to award NEA grants on the basis of, *inter alia*, artistic excellence).

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small group of newspapers."); *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 660, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994) ("The taxes invalidated in *Minneapolis Star* and *Arkansas Writers' Project* . . . targeted a small number of speakers, and thus threatened to distort the market for ideas.") (internal quotation marks and citation omitted).

Nonetheless, we disagree with the government's argument that public libraries' use of Internet filters is no different, for First Amendment purposes, from the editorial discretion that they exercise when they choose to acquire certain books on the basis of librarians' evaluation of their quality. The central difference, in our view, is that by providing patrons with even filtered Internet access, the library permits patrons to receive speech on a virtually unlimited number of topics, from a virtually unlimited number of speakers, without attempting to restrict patrons' access to speech that the library, in the exercise of its professional judgment, determines to be particularly valuable. *Cf. Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995) (applying strict scrutiny to viewpoint-based restrictions where the state "does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers"). *See generally supra* Section IV.C.

In those cases upholding the government's exercise of editorial discretion in selecting certain speech for subsidization or inclusion in a state-created forum, the state actor exercising the editorial discretion has at least reviewed the content of the speech that the forum facilitates. Thus, in *Finley* the NEA examined the content of those works of art that it chose to subsidize, and in *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed .2d 875 (1998), the public broadcaster specifically reviewed and approved each speaker permitted to participate in the debate. *See id.* at 673, 118 S. Ct. 1633 ("In the case of television broadcasting, . . . broad rights of access for outside speakers would be antithetical, as a general

rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations."); *Finley*, 524 U.S. at 586, 118 S. Ct. 2168 ("The NEA's mandate is to make esthetic judgments, and the inherently content-based 'excellence' threshold for NEA support sets it apart from the subsidy at issue in *Rosenberger*—which was available to all student organizations that were 'related to the educational purpose of the University . . . .'") (quoting *Rosenberger*, 515 U.S. at 824, 115 S. Ct. 2510); *see also Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 804, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985) ("The Government's consistent policy has been to limit participation in the [Combined Federal Campaign] to 'appropriate' voluntary agencies and to require agencies seeking admission to obtain permission from federal and local Campaign officials. . . . [T]here is no evidence suggesting that the granting of the requisite permission is merely ministerial."). The essence of editorial discretion requires the exercise of professional judgment in examining the content that the government singles out as speech of particular value.

This exercise of editorial discretion is evident in a library's decision to acquire certain books for its collection. As the government's experts in library science testified, in selecting a book for a library's collection, librarians evaluate the book's quality by reference to a variety of criteria such as its accuracy, the title's niche in relation to the rest of the collection, the authority of the author, the publisher, the work's presentation, and how it compares with other material available in the same genre or on the same subject. Thus, the content of every book that a library acquires has been reviewed by the library's collection development staff or someone

to whom they have delegated the task, and has been judged to meet the criteria that form the basis for the library's collection development policy. Although some public libraries use "approval plans" to delegate the collection development to third-party vendors which provide the library with recommended materials that the library is then free to retain or return to the vendor, the same principle nonetheless attains.

In contrast, in providing patrons with even filtered Internet access, a public library invites patrons to access speech whose content has never been reviewed and recommended as particularly valuable by either a librarian or a third party to whom the library has delegated collection development decisions. Although several of the government's librarian witnesses who testified at trial purport to apply the same standards that govern the library's acquisition of print materials to the library's provision of Internet access to patrons, when public libraries provide their patrons with Internet access, they intentionally open their doors to vast amounts of speech that clearly lacks sufficient quality to ever be considered for the library's print collection. Unless a library allows access to only those sites that have been preselected as having particular value, a method that, as noted above, was tried and rejected by the Westerville Ohio Public Library, *see supra* at 46- 47, 103 S. Ct. 948, even a library that uses software filters has opened its Internet collection "for indiscriminate use by the general public." *Perry Educ. Ass'n v. Perry Local Educs. Ass'n*, 460 U.S. 37, 47, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983). "[M]ost Internet forums—including chat rooms, newsgroups, mail exploders, and the Web—are open to all comers." *Reno v.*

ACLU, 521 U.S. 844, 880, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997).

The fundamental difference between a library's print collection and its provision of Internet access is illustrated by comparing the extent to which the library opens its print collection to members of the public to speak on a given topic and the extent to which it opens its Internet terminals to members of the public to speak on a given topic. When a public library chooses to carry books on a selected topic, e.g. chemistry, it does not open its print collection to any member of the public who wishes to write about chemistry. Rather, out of the myriad of books that have ever been written on chemistry, each book on chemistry that the library carries has been reviewed and selected because the person reviewing the book, in the exercise of his or her professional judgment, has deemed its content to be particularly valuable. In contrast, when a public library provides Internet access, even filtered Internet access, it has created a forum open to any member of the public who writes about chemistry on the Internet, regardless of how unscientific the author's methods or of how patently false the author's conclusions are, regardless of the author's reputation or grammar, and regardless of the reviews of the scientific community.

Notwithstanding protestations in CIPA's legislative history to the contrary,[24] members of the general public

[24] [P]atrons at a library do not have the right to make editorial decisions regarding the availability of certain material. It is the exclusive authority of the library to make affirmative decisions regarding what books, magazines, or other material is placed on library shelves, or otherwise made available to patrons. Libraries impose many restrictions on the use of their systems which demonstrate that the content of the library's offerings are not determined by the general public. S. Rep. No. 106-141, at 8-9 (1999).

do define the content that public libraries make available to their patrons through the Internet. Any member of the public with Internet access could, through the free Web hosting services available on the Internet, tonight jot down a few musings on any subject under the sun, and tomorrow those musings would become part of public libraries' online offerings and be available to any library patron who seeks them out.

In providing its patrons with Internet access, a public library creates a forum for the facilitation of speech, almost none of which either the library's collection development staff or even the filtering companies have ever reviewed. Although filtering companies review a portion of the Web in classifying particular sites, the portion of the Web that the filtering companies actually review is quite small in relation to the Web as a whole. The filtering companies' harvesting process, described in our findings of fact, is intended to identify only a small fraction of Web sites for the filtering companies to review. Put simply, the state cannot be said to be exercising editorial discretion permitted under the First Amendment when it indiscriminately facilitates private speech whose content it makes no effort to examine. *Cf.* Bell, *supra*, at 226 ("[C]ourts should take a much more jaundiced view of library policies that block Internet access to a very limited array of subjects than they take of library policies that reserve Internet terminals for very limited use.").

While the First Amendment permits the government to exercise editorial discretion in singling out particularly favored speech for subsidization or inclusion in

a state-created forum, we believe that where the state provides access to a "vast democratic forum[ ]," *Reno*, 521 U.S. at 868, 117 S. Ct. 2329, open to any member of the public to speak on subjects "as diverse as human thought," *id.* at 870, 117 S. Ct. 2329, and then selectively excludes from the forum certain speech on the basis of its content, such exclusions are subject to strict scrutiny. These exclusions risk fundamentally distorting the unique marketplace of ideas that public libraries create when they open their collections, via the Internet, to the speech of millions of individuals around the world on a virtually limitless number of subjects.[25]

[25] In distinguishing restrictions on public libraries' print collections from restrictions on the provision of Internet access, we do not rely on the rationale adopted in *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, 2 F. Supp. 2d 783 (E.D.Va. 1998). The *Loudoun* Court reasoned that a library's decision to block certain Web sites fundamentally differs from its decision to carry certain books but not others, in that unlike the money and shelf space consumed by the library's provision of print materials, "no appreciable expenditure of library time or resources is required to make a particular Internet publication available" once the library has acquired Internet access. *Id.* at 793-94.

We disagree. Nearly every librarian who testified at trial stated that patrons' demand for Internet access exceeds the library's supply of Internet terminals. Under such circumstances, every time library patrons visit a Web site, they deny other patrons waiting to use the terminal access to other Web sites. Just as the scarcity of a library's budget and shelf space constrains a library's ability to provide its patrons with unrestricted access to print materials, the scarcity of time at Internet terminals constrains libraries' ability to provide patrons with unrestricted Internet access: The same budget concerns constraining the number of books that libraries can offer also limits the number of terminals, Internet accounts, and speed of access links that can be purchased, and thus the number of Web pages that patrons can view. This is clear to anyone who has been denied access to a Website because no terminal was unoccupied. Mark S. Nadel, *The First Amendment's Limitations on the Use of Internet Filtering in Public and School Libraries: What Content Can Libraries Exclude?*, 78 Tex. L. Rev. 1117, 1128 (2000).

A public library's content-based restrictions on patrons' Internet access thus resemble the content-based restrictions on speech subsidized by the government, whether through direct funding or through the creation of a designated public forum, that the Supreme Court has subjected to strict scrutiny, as discussed above in Section IV.C. Although the government may subsidize a particular message representing the government's viewpoint without having to satisfy strict scrutiny, *see Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991), strict scrutiny applies to restrictions that selectively exclude particular viewpoints from a public forum designed to facilitate a wide range of viewpoints, *see Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995). Similarly, although the state's exercise of editorial discretion in selecting particular speakers for participation in a state-sponsored forum is subject to rational basis review, *see Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998), selective exclusions of particular speakers from a forum otherwise open to any member of the public to speak are subject to strict scrutiny, *see City of Madison Joint School Dist. No. 8 v. Wis. Employment Relations Comm'n*, 429 U.S. 167, 97 S. Ct. 421, 50 L. Ed. 2d 376 (1976).

And while the government may, subject only to rational basis review, make content-based decisions in selecting works of artistic excellence to subsidize, *see NEA v. Finley*, 524 U.S. 569, 118 S. Ct. 2168, 141 L. Ed.

2d 500 (1998), the Supreme Court has applied heightened scrutiny where the government opens a general-purpose municipal theater for use by the public, but selectively excludes disfavored content, *see Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975), where the government facilitates the speech of public broadcasters on a virtually limitless number of topics, but prohibits editorializing, *see FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984), and where the government funds a wide range of legal services but restricts funding recipients from challenging welfare laws, *see Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001). Similarly, where a public library opens a forum to an unlimited number of speakers around the world to speak on an unlimited number of topics, strict scrutiny applies to the library's selective exclusions of particular speech whose content the library disfavors.

2. Analogy to Traditional Public Fora

Application of strict scrutiny to public libraries' use of software filters, in our view, finds further support in the extent to which public libraries' provision of Internet access promotes First Amendment values in an analogous manner to traditional public fora, such as sidewalks and parks, in which content-based restrictions on speech are always subject to strict scrutiny. The public library, by its very nature, is "designed for freewheeling inquiry." *Bd. of Education v. Pico*, 457 U.S. 853, 915, 102 S. Ct. 2799, 73 L. Ed. 2d 435 (1982) (Rehnquist, J., dissenting). As such, the library is a "mighty resource in the free marketplace of ideas," *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 582 (6th Cir. 1976), and represents a "quintessential

locus of the receipt of information." *Kreimer v. Bureau of Police for Morristown*, 958 F.2d 1242, 1255 (3d Cir. 1992); *see also Sund v. City of Wichita Falls*, 121 F. Supp. 2d 530, 547 (N.D. Tex. 2000) ("The right to receive information is vigorously enforced in the context of a public library . . . ."); *cf. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 681, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992) ("[A] traditional public forum is property that has as 'a principal purpose . . . the free exchange of ideas.'") (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985)).

We acknowledge that the provision of Internet access in a public library does not enjoy the historical pedigree of streets, sidewalks, and parks as a vehicle of free expression. Nonetheless, we believe that it shares many of the characteristics of these traditional public fora that uniquely promote First Amendment values and accordingly warrant application of strict scrutiny to any content-based restriction on speech in these fora. Regulation of speech in streets, sidewalks, and parks is subject to the highest scrutiny not simply by virtue of history and tradition, but also because the speech-facilitating character of sidewalks and parks makes them distinctly deserving of First Amendment protection. Many of these same speech-promoting features of the traditional public forum appear in public libraries' provision of Internet access.

First, public libraries, like sidewalks and parks, are generally open to any member of the public who wishes to receive the speech that these fora facilitate, subject only to narrow limitations. *See Kreimer*, 958 F.2d at 1260 (noting that a public library does not retain unfettered discretion "to choose whom it will permit to

enter the Library," but upholding the library's right to exclude patrons who harass patrons or whose offensive personal hygiene precludes the library's use by other patrons). Moreover, like traditional public fora, public libraries are funded by taxpayers and therefore do not charge members of the public each time they use the forum. The only direct cost to library patrons who wish to receive information, whether via the Internet or the library's print collection, is the time spent reading.

By providing Internet access to millions of Americans to whom such access would otherwise be unavailable, public libraries play a critical role in bridging the digital divide separating those with access to new information technologies from those that lack access. *See generally* National Telecommunications and Information Administration, U.S. Department of Commerce, *Falling Through the Net: Defining the Digital Divide* (1999), *available at http://www.ntia.doc.gov/ntiahome/fttn99/contents.html*. *Cf. Velazquez*, 531 U.S. at 546, 121 S. Ct. 1043 (invalidating a content-based restriction on the speech of federally funded legal services corporations and noting that given the financial hardship of legal services corporations' clients, "[t]he restriction on speech is even more problematic because in cases where the attorney withdraws from a representation, the client is unlikely to find other counsel"). Public libraries that provide Internet access greatly expand the educational opportunities for millions of Americans who, as explained in the margin, would otherwise be deprived of the benefits of this new medium.[26]

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[26] We have found that approximately 14.3 million Americans access the Internet at a public library, and Internet access at public libraries is more often used by those with lower incomes than those with higher incomes. We found that about 20.3% of Internet users with household family income of less than $15,000 per year use public libraries for Internet access, and approximately 70% of libraries serving communities with poverty levels in excess of 40% receive E-rate discounts. The widespread availability of Internet access in public libraries is due, in part, to the availability of public funding, including state and local funding and the federal funding programs regulated by CIPA.

Just as important as the openness of a forum to listeners is its openness to speakers. Parks and sidewalks are paradigmatic loci of First Amendment values in large part because they permit speakers to communicate with a wide audience at low cost. One can address members of the public in a park for little more than the cost of a soapbox, and one can distribute handbills on the sidewalk for little more than the cost of a pen, paper, and some photocopies. *See Martin v. City of Struthers*, 319 U.S. 141, 146, 63 S. Ct. 862, 87 L. Ed. 1313 (1943) ("Door to door distribution of circulars is essential to the poorly financed causes of little people."); Laurence H. Tribe, *American Constitutional Law* § 12-24 at 987 (2d ed. 1988) ("The 'public forum' doctrine holds that restrictions on speech should be subject to higher scrutiny when, all other things being equal, that speech occurs in areas playing a vital role in communication—such as in those places historically associated with first amendment activities, such as streets, sidewalks, and parks—especially because of how indispensable communication in these places is to people who lack access to more elaborate (and more costly) channels."); Daniel A. Farber, *Free Speech without Romance: Public Choice and the First Amendment*, 105 Harv. L. Rev. 554, 574 n.86 (1991) (noting that traditional public fora "are often the only place where less affluent groups and individuals can effectively express their message"); Harry Kalven, Jr., *The Concept of the*

Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 30 ("[T]he parade, the picket, the leaflet, the sound truck, have been the media of communication exploited by those with little access to the more genteel means of communication.").

Similarly, given the existence of message boards and free Web hosting services, a speaker can, via the Internet, address the public, including patrons of public libraries, for little more than the cost of Internet access. As the Supreme Court explained in *Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997), "the Internet can hardly be considered a 'scarce' expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds." *Id.* at 870, 117 S. Ct. 2329. Although the cost of a home computer and Internet access considerably exceeds the cost of a soapbox or a few hundred photocopies, speakers wishing to avail themselves of the Internet may gain free access in schools, workplaces, or the public library. As Professor Lessig has explained:

> The "press" in 1791 was not the *New York Times* or the *Wall Street Journal*. It did not comprise large organizations of private interests, with millions of readers associated with each organization. Rather, the press then was much like the Internet today. The cost of a printing press was low, the readership was slight, and anyone (within reason) could become a publisher—and in fact an extraordinary number did. When the Constitution speaks of the rights of the "press," the architecture it has in mind is the architecture of the Internet.

Lawrence Lessig, *Code* 183 (1999).

While public libraries' provision of Internet access shares many of the speech-promoting qualities of traditional public fora, it also facilitates speech in ways that traditional public fora cannot.[27] In particular, whereas the architecture of real space limits the audience of a pamphleteer or soapbox orator to people within the speaker's immediate vicinity, the Internet renders the geography of speaker and listener irrelevant:

> Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.

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[27] We acknowledge that traditional public fora have characteristics that promote First Amendment values in ways that the provision of Internet access in public libraries does not. For example, a significant virtue of traditional public fora is their facilitation of face-to-face communication. "In a face-to-face encounter there is a greater opportunity for the exchange of ideas and the propagation of views. . . ." *Cornelius*, 473 U.S. at 798, 105 S. Ct. 3439. Face-to-face exchanges also permit speakers to confront listeners who would otherwise not actively seek out the information that the speaker has to offer. In contrast, the Internet operates largely by providing individuals with only that information that they actively seek out. Although the Internet does not permit face-to-face communication in the same way that traditional public fora do, the Internet, as a medium of expression, is significantly more interactive than the broadcast media and the press. "[T]he Web makes it possible to establish two-way linkages with potential sympathizers. Unlike the unidirectional nature of most mass media, websites, bulletin boards, chatrooms, and email are potentially interactive." Seth F. Kreimer, *Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet*, 150 U. Pa. L. Rev. 119, 130 (2001).

Reno, 521 U.S. at 870, 117 S. Ct. 2329. By providing patrons with Internet access, public libraries in effect open their doors to an unlimited number of potential speakers around the world, inviting the speech of any member of the public who wishes to communicate with library patrons via the Internet.

Due to the low costs for speakers and the irrelevance of geography, the volume of speech available to library patrons on the Internet is enormous and far exceeds the volume of speech available to audiences in traditional public fora. *See id.* at 868, 117 S. Ct. 2329 (referring to "the vast democratic forums of the Internet"). Indeed, as noted in our findings of fact, the Web is estimated to contain over one billion pages, and is said to be growing at a rate of over 1.5 million pages per day. *See id.* at 885, 117 S. Ct. 2329 (noting "[t]he dramatic expansion of this new marketplace of ideas"). This staggering volume of content on the Internet "is as diverse as human thought," *id.* at 870, 117 S. Ct. 2329, and "is thus comparable, from the reader's viewpoint, to ... a vast library including millions of readily available and indexed publications," *id.* at 853, 117 S. Ct. 2329. As a result of the Internet's unique speech-facilitating qualities, "it is hard to find an aspiring social movement, new or old, of left, right, or center, without a website, a bulletin board, and an email list." Kreimer, *supra* n.27, at 125. "[T]he growth of the Internet has been and continues to be phenomenal." *Reno*, 521 U.S. at 885, 117 S. Ct. 2329.

This extraordinary growth of the Internet illustrates the extent to which the Internet promotes First Amendment values in the same way that the historical use of traditional public fora for speaking, handbilling, and protesting testifies to their effectiveness as

vehicles for free speech. *Cf. Martin*, 319 U.S. at 145, 63 S. Ct. 862 ("The widespread use of this method of communication [door-to-door distribution of leaflets] by many groups espousing various causes attests its major importance."); *Schneider v. State*, 308 U.S. 147, 164, 60 S. Ct. 146, 84 L. Ed. 155 (1939) ("[P]amphlets have proved most effective instruments in the dissemination of opinion.").

The provision of Internet access in public libraries, in addition to sharing the speech-enhancing qualities of fora such as streets, sidewalks, and parks, also supplies many of the speech-enhancing properties of the postal service, which is open to the public at large as both speakers and recipients of information, and provides a relatively low-cost means of disseminating information to a geographically dispersed audience. *See Lamont v. Postmaster Gen.*, 381 U.S. 301, 85 S. Ct. 1493, 14 L. Ed. 2d 398 (1965) (invalidating a content-based prior restraint on the use of the mails); *see also Blount v. Rizzi*, 400 U.S. 410, 91 S. Ct. 423, 27 L. Ed. 2d 498 (1971) (same). Indeed, the Supreme Court's description of the postal system in *Lamont* seems equally apt as a description of the Internet today: "the postal system . . . is now the main artery through which the business, social, and personal affairs of the people are conducted. . . ." 381 U.S. at 305 n.3, 85 S. Ct. 1493.

In short, public libraries, by providing their patrons with access to the Internet, have created a public forum that provides any member of the public free access to information from millions of speakers around the world. The unique speech-enhancing character of Internet use in public libraries derives from the openness of the public library to any member of the public seeking to receive information, and the openness of the Internet to

any member of the public who wishes to speak. In particular, speakers on the Internet enjoy low barriers to entry and the ability to reach a mass audience, unhindered by the constraints of geography.[28] Moreover, just as the development of new media "presents unique problems, which inform our assessment of the interests at stake, and which may justify restrictions that would be unacceptable in other contexts," *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813, 120 S. Ct. 1878, 146 L. Ed .2d 865 (2000), the development of new media, such as the Internet, also presents unique possibilities for promoting First Amendment values, which also inform our assessment of the interests at stake, and which we believe, in the context of the provision of Internet access in public libraries, justify the application of heightened scrutiny to content-based restrictions that might be subject to only rational review in other contexts, such as the development of the library's print collection. *Cf. id.* at 818, 120 S. Ct. 1878 ("Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us.").

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[28] We acknowledge that the Internet's architecture is a human creation, and is therefore subject to change. The foregoing analysis of the unique speech-enhancing qualities of the Internet is limited to the Internet as currently constructed. Indeed, the characteristics of the Internet that we believe render it uniquely suited to promote First Amendment values may change as the Internet's architecture evolves. *See* Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 Emory L. J. 869, 888 (1996) ("Cyberspace has no permanent nature, save the nature of a place of unlimited plasticity. We don't *find* cyberspace, we build it."); *see also* Lawrence Lessig, *The Death of Cyberspace*, 57 Wash. & Lee L. Rev. 337 (2000).

A faithful translation of First Amendment values from the context of traditional public fora such as sidewalks and parks to the distinctly non-traditional public forum of Internet access in public libraries requires, in our view, that content-based restrictions on Internet access in public libraries be subject to the same exacting standards of First Amendment scrutiny as content-based restrictions on speech in traditional public fora such as sidewalks, town squares, and parks:

> The architecture of the Internet, as it is right now, is perhaps the most important model of free speech since the founding. . . . Two hundred years after the framers ratified the Constitution, the Net has taught us what the First Amendment means. . . . The model for speech that the framers embraced was the model of the Internet—distributed, non-centralized, fully free and diverse.

Lessig, *Code*, at 167, 185. Indeed, "[m]inds are not changed in streets and parks as they once were. To an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media." *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 802-03, 116 S. Ct. 2374, 135 L.Ed.2d 888 (1996) (Kennedy, J., concurring in the judgment).

In providing patrons with even filtered Internet access, a public library is not exercising editorial discretion in selecting only speech of particular quality for inclusion in its collection, as it may do when it decides to acquire print materials. By providing its patrons with Internet access, public libraries create a forum in which any member of the public may receive speech from anyone around the world who wishes to disseminate

information over the Internet. Within this "vast democratic forum[ ]," *Reno*, 521 U.S. at 868, 117 S. Ct. 2329, which facilitates speech that is "as diverse as human thought," *id.* at 870, 117 S. Ct. 2329, software filters single out for exclusion particular speech on the basis of its disfavored content. We hold that these content-based restrictions on patrons' access to speech are subject to strict scrutiny.

V. Application of Strict Scrutiny

Having concluded that strict scrutiny applies to public libraries' content-based restrictions on patrons' access to speech on the Internet, we must next determine whether a public library's use of Internet software filters can survive strict scrutiny. To survive strict scrutiny, a restriction on speech "must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000) (citation omitted); *see also Fabulous Assocs., Inc. v. Pa. Pub. Util. Comm'n*, 896 F.2d 780, 787 (3d Cir. 1990) (holding that a content-based burden on speech is permissible "only if [the government] shows that the restriction serves a compelling interest and that there are no less restrictive alternatives").

The application of strict scrutiny to a public library's use of filtering products thus requires three distinct inquiries. First, we must identify those compelling government interests that the use of filtering software promotes. It is then necessary to analyze whether the use of software filters is narrowly tailored to further those interests. Finally, we must determine whether

less restrictive alternatives exist that would promote the state interest.

A. State Interests

We begin by identifying those legitimate state interests that a public library's use of software filters promotes.

1. Preventing the Dissemination of Obscenity, Child Pornography, and Material Harmful to Minors

On its face, CIPA is clearly intended to prevent public libraries' Internet terminals from being used to disseminate to library patrons visual depictions that are obscene, child pornography, or in the case of minors, harmful to minors. *See* CIPA § 1712 (codified at 20 U.S.C. § 9134(f)(1)(A) & (B)), § 1721(b) (codified at 47 U.S.C. § 254(h)(6)(B) & (C)) (requiring any library that receives E-rate discounts to certify that it is enforcing "a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions" that are "obscene" or "child pornography," and, when the computers are in use by minors, also protects against access to visual depictions that are "harmful to minors").

The government's interest in preventing the dissemination of obscenity, child pornography, or, in the case of minors, material harmful to minors, is well-established. Speech that is obscene, under the legal definition of obscenity set forth in the margin, is unprotected under the First Amendment, and accordingly the state has a compelling interest in preventing its

distribution.[29] *See Miller v. California*, 413 U.S. 15, 18, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973) ("This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material."); *Stanley v. Georgia*, 394 U.S. 557, 563, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969) ("[T]he First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity."); *Roth v. United States*, 354 U.S. 476, 485, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957) ("We hold that obscenity is not within the area of constitutionally protected speech of press.").

The First Amendment also permits the state to prohibit the distribution to minors of material that, while not obscene with respect to adults, is obscene with respect to minors. *See Ginsberg v. New York*, 390 U.S. 629, 637, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968) (holding that it is constitutionally permissible "to accord minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see"). Proscribing the distribution of such material to minors is constitutionally justified by the government's well-recognized interest in safeguarding minors' well-being. *See Reno v. ACLU*, 521 U.S. 844, 869-70, 117 S. Ct. 2329, 138 L. Ed .2d 874 (1997) ("[T]here is a compelling interest in protecting the physical and psychological well-being of minors which extend[s] to shielding them

[29] For First Amendment purposes, obscenity is "limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973).

from indecent messages that are not obscene by adult standards . . . .") (internal quotation marks and citation omitted); *New York v. Ferber*, 458 U.S. 747, 756-57, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982) ("It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling.") (internal quotation marks and citation omitted); *Ginsberg*, 390 U.S. at 640, 88 S. Ct. 1274 ("The State . . . has an independent interest in the well-being of its youth.").

The government's compelling interest in protecting the well-being of its youth justifies laws that criminalize not only the distribution to minors of material that is harmful to minors, but also the possession and distribution of child pornography. *See Osborne v. Ohio*, 495 U.S. 103, 111, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990) (holding that a state "may constitutionally proscribe the possession and viewing of child pornography"); *Ferber*, 458 U.S. at 757, 763, 102 S. Ct. 3348 (noting that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance," and holding that "child pornography [is] a category of material outside the protection of the First Amendment").

Thus, a public library's use of software filters survives strict scrutiny if it is narrowly tailored to further the state's well-recognized interest in preventing the dissemination of obscenity and child pornography, and in preventing minors from being exposed to material harmful to their well-being.

2. Protecting the Unwilling Viewer

Several of the libraries that use filters assert that filters serve the libraries' interest in preventing pa-

trons from being unwillingly exposed to sexually explicit speech that the patrons find offensive. Nearly every library proffered by either the government or the plaintiffs received complaints, in varying degrees of frequency, from library patrons who saw other patrons accessing sexually explicit material on the library's Internet terminals.

In general, First Amendment jurisprudence is reluctant to recognize a legitimate state interest in protecting the unwilling viewer from speech that is constitutionally protected. "Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists. We are expected to protect our own sensibilities simply by averting our eyes." *Playboy*, 529 U.S. at 813, 120 S. Ct. 1878 (2000) (internal quotation marks and citation omitted); *see also Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975) ("[W]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power.").

For example, in *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L. Ed. 2d 284 (1971), the Supreme Court reversed defendant's conviction for wearing, in a municipal courthouse, a jacket bearing the inscription "Fuck the Draft." The Court noted that "much has been made of the claim that Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to appellant's

crude form of protest." *Id.* at 21, 91 S. Ct. 1780. This justification for suppressing speech failed, however, because it "would effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Id.* The Court concluded that "[t]hose in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Id.*

Similarly, in *Erznoznik*, the Court invalidated on its face a municipal ordinance prohibiting drive-in movie theaters from showing films containing nudity if they were visible from a public street or place. The city's "primary argument [was] that it may protect its citizens against unwilling exposure to materials that may be offensive." 422 U.S. at 208, 95 S. Ct. 2268. The Court soundly rejected this interest in shielding the unwilling viewer:

> The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, we are inescapably captive audiences for many purposes. Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent . . . narrow circumstances . . . the burden normally falls upon the viewer to avoid further bombardment of his sensibilities simply by averting his eyes.

422 U.S. at 210-11, 95 S. Ct. 2268 (internal quotation marks and citation omitted).

The state's interest in protecting unwilling viewers from exposure to patently offensive material is accounted for, to some degree, by obscenity doctrine, which originated in part to permit the state to shield the unwilling viewer. "The *Miller* standard, like its predecessors, was an accommodation between the State's interests in protecting the sensibilities of unwilling recipients from exposure to pornographic material and the dangers of censorship inherent in unabashedly content-based laws." *Ferber*, 458 U.S. at 756, 102 S. Ct. 3348 (internal quotation marks and citation omitted); *see also Miller*, 413 U.S. at 18-19, 93 S. Ct. 2607 ("This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles.") (citation omitted). To the extent that speech has serious literary, artistic, political, or scientific value, and therefore is not obscene under the *Miller* test of obscenity, the state's interest in shielding unwilling viewers from such speech is tenuous.

Nonetheless, the Court has recognized that in certain limited circumstances, the state has a legitimate interest in protecting the public from unwilling exposure to speech that is not obscene. This interest has justified restrictions on speech "when the speaker intrudes on the privacy of the home, or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." *Erznoznik*, 422 U.S. at 209, 95 S. Ct. 2268 (citations omitted). Thus, in *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978), the Court relied on the state's interest in

shielding viewers' sensibilities to uphold a prohibition against profanity in radio broadcasts:

> Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content.

Id. at 748, 98 S. Ct. 3026 (citation omitted); *accord Frisby v. Schultz*, 487 U.S. 474, 485, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988) ("Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different."); *see also Lehman v. City of Shaker Heights*, 418 U.S. 298, 302, 94 S. Ct. 2714, 41 L. Ed. 2d 770 (1974) (plurality opinion) (upholding a content-based restriction on the sale of advertising space in public transit vehicles and noting that "[t]he streetcar audience is a captive audience").

Although neither the Supreme Court nor the Third Circuit has recognized a compelling state interest in shielding the sensibilities of unwilling viewers, beyond laws intended to preserve the privacy of individuals' homes or to protect captive audiences, we do not read the case law as categorically foreclosing recognition, in the public library setting, of the state's interest in protecting unwilling viewers. *See Pacifica*, 438 U.S. at 749 n.27, 98 S. Ct. 3026 ("Outside the home, the balance between the offensive speaker and the unwilling audience may *sometimes* tip in favor of the speaker, requiring the offended listener to turn away.") (emphasis

added). Under certain circumstances, therefore a public library might have a compelling interest in protecting library patrons and staff from unwilling exposure to sexually explicit speech that, although not obscene, is patently offensive.

3. Preventing Unlawful or Inappropriate Conduct

Several of the librarians proffered by the government testified that unfiltered Internet access had led to occurrences of criminal or otherwise inappropriate conduct by library patrons, such as public masturbation, and harassment of library staff and patrons, sometimes rising to the level of physical assault. As in the case with patron complaints, however, the government adduced no quantitative data comparing the frequency of criminal or otherwise inappropriate patron conduct before the library's use of filters and after the library's use of filters. The sporadic anecdotal accounts of the government's library witnesses were countered by anecdotal accounts by the plaintiffs' library witnesses, that incidents of offensive patron behavior in public libraries have long predated the advent of Internet access.

Aside from a public library's interest in preventing patrons from using the library's Internet terminals to receive obscenity or child pornography, which constitutes criminal conduct, we are constrained to reject any compelling state interest in regulating patrons' conduct as a justification for content-based restrictions on patrons' Internet access. "[T]he Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct." *Ashcroft*, — U.S. at ——, 122 S. Ct. at 1403. First Amendment jurisprudence makes clear that speech may not be restricted on

the ground that restricting speech will reduce crime or other undesirable behavior that the speech is thought to cause, subject to only a narrow exception for speech that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) (per curiam). "The mere tendency of speech to encourage unlawful acts is insufficient reason for banning it." *Ashcroft*, — U.S. at —, 122 S. Ct. at 1403.

Outside of the narrow "incitement" exception, the appropriate method of deterring unlawful or otherwise undesirable behavior is not to suppress the speech that induces such behavior, but to attach sanctions to the behavior itself. "Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgement of the rights of free speech." *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of New York*, 360 U.S. 684, 689, 79 S. Ct. 1362, 3 L. Ed. 2d 1512 (1959) (quoting *Whitney v. Cal.*, 274 U.S. 357, 378, 47 S. Ct. 641, 71 L. Ed. 1095 (1927) (Brandeis, J., concurring)); *see also Bartnicki v. Vopper*, 532 U.S. 514, 529, 121 S. Ct. 1753, 149 L. Ed. 2d 787 (2001) ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it.").

4. Summary

In sum, we reject a public library's interest in preventing unlawful or otherwise inappropriate patron conduct as a basis for restricting patrons' access to speech on the Internet. The proper method for a library to deter unlawful or inappropriate patron conduct, such as harassment or assault of other patrons, is

to impose sanctions on such conduct, such as either removing the patron from the library, revoking the patron's library privileges, or, in the appropriate case, calling the police. We believe, however, that the state interests in preventing the dissemination of obscenity, child pornography, or in the case of minors, material harmful to minors, and in protecting library patrons from being unwillingly exposed to offensive, sexually explicit material, could all justify, for First Amendment purposes, a public library's use of Internet filters, provided that use of such filters is narrowly tailored to further those interests, and that no less restrictive means of promoting those interests exist. Accordingly, we turn to the narrow tailoring question.

B. Narrow Tailoring

Having identified the relevant state interests that could justify content-based restrictions on public libraries' provision of Internet access, we must determine whether a public library's use of software filters is narrowly tailored to further those interests. "It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 109 S. Ct. 2829, 106 L. Ed. 2d 93 (1989). "[M]anifest imprecision of [a] ban . . . reveals that its proscription is not sufficiently tailored to the harms it seeks to prevent to justify . . . substantial interference with . . . speech." *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 392, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984).

The commercially available filters on which evidence was presented at trial all block many thousands of Web pages that are clearly not harmful to minors, and many

thousands more pages that, while possibly harmful to minors, are neither obscene nor child pornography. *See supra*, Subsection II.E.7. Even the defendants' own expert, after analyzing filtering products' performance in public libraries, concluded that of the blocked Web pages to which library patrons sought access, between 6% and 15% contained no content that meets even the filtering products' own definitions of sexually explicit content, let alone the legal definitions of obscenity or child pornography, which none of the filtering companies that were studied use as the basis for their blocking decisions. Moreover, in light of the flaws in these studies, discussed in detail in our findings of fact above, these percentages significantly underestimate the amount of speech that filters erroneously block, and at best provide a rough lower bound on the filters' rates of overblocking. Given the substantial amount of constitutionally protected speech blocked by the filters studied, we conclude that use of such filters is not narrowly tailored with respect to the government's interest in preventing the dissemination of obscenity, child pornography, and material harmful to minors.

To be sure, the quantitative estimates of the rates of overblocking apply only to those four commercially available filters analyzed by plaintiffs' and defendants' expert witnesses. Nonetheless, given the inherent limitations in the current state of the art of automated classification systems, and the limits of human review in relation to the size, rate of growth, and rate of change of the Web, there is a tradeoff between underblocking and overblocking that is inherent in *any* filtering technology, as our findings of fact have demonstrated. We credit the testimony of plaintiffs' expert witness, Dr. Geoffrey Nunberg, that no software

exists that can automatically distinguish visual depictions that are obscene, child pornography, or harmful to minors, from those that are not. Nor can software, through keyword analysis or more sophisticated techniques, consistently distinguish web pages that contain such content from web pages that do not.

In light of the absence of any automated method of classifying Web pages, filtering companies are left with the Sisyphean task of using human review to identify, from among the approximately two billion web pages that exist, the 1.5 million new pages that are created daily, and the many thousands of pages whose content changes from day to day, those particular web pages to be blocked. To cope with the Web's extraordinary size, rate of growth, and rate of change, filtering companies that rely solely on human review to block access to material falling within their category definitions must use a variety of techniques that will necessarily introduce substantial amounts of overblocking. These techniques include blocking every page of a Web site that contains only some content falling within the filtering companies' category definitions, blocking every Web site that shares an IP-address with a Web site whose content falls within the category definitions, blocking "loophole sites," such as anonymizers, cache sites, and translation sites, and allocating staff resources to reviewing content of uncategorized pages rather than re-reviewing pages, domain names, or IP-addresses that have been already categorized to determine whether their content has changed. While a filtering company could choose not to use these techniques, due to the overblocking errors they introduce, if a filtering company does not use such techniques, its

filter will be ineffective at blocking access to speech that falls within its category definitions.

Thus, while it would be easy to design, for example, a filter that blocks only ten Web sites, all of which are either obscene, child pornography, or harmful to minors, and therefore completely avoids overblocking, such a filter clearly would not comply with CIPA, since it would fail to offer any meaningful protection against the hundreds of thousands of Web sites containing speech in these categories. As detailed in our findings of fact, any filter that blocks enough speech to protect against access to visual depictions that are obscene, child pornography, and harmful to minors, will necessarily overblock substantial amounts of speech that does not fall within these categories.

This finding is supported by the government's failure to produce evidence of any filtering technology that avoids overblocking a substantial amount of protected speech. Where, as here, strict scrutiny applies to a content-based restriction on speech, the burden rests with the government to show that the restriction is narrowly tailored to serve a compelling government interest. *See Playboy*, 529 U.S. at 816, 120 S. Ct. 1878 ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992) ("Content-based regulations are presumptively invalid."). Thus, it is the government's burden, in this case, to show the existence of a filtering technology that both blocks enough speech to qualify as a technology protection measure, for purposes of CIPA, and avoids overblocking a substantial amount of constitutionally protected speech.

Here, the government has failed to meet its burden. Indeed, as discussed in our findings of fact, every technology protection measure used by the government's library witnesses or analyzed by the government's expert witnesses blocks access to a substantial amount of speech that is constitutionally protected with respect to both adults and minors. In light of the credited testimony of Dr. Nunberg, and the inherent tradeoff between overblocking and underblocking, together with the government's failure to offer evidence of any technology protection measure that avoids overblocking, we conclude that any technology protection measure that blocks a sufficient amount of speech to comply with CIPA's requirement that it "protect[ ] against access through such computers to visual depictions that are—(I) obscene; (II) child pornography; or (III) harmful to minors" will necessarily block substantial amounts of speech that does not fall within these categories. CIPA § 1712 (codified at 20 U.S.C. § 9134(f)(1)(A)). Hence, any public library's use of a software filter required by CIPA will fail to be narrowly tailored to the government's compelling interest in preventing the dissemination, through Internet terminals in public libraries, of visual depictions that are obscene, child pornography, or harmful to minors.

Where, as here, strict scrutiny applies, the government may not justify restrictions on constitutionally *protected* speech on the ground that such restrictions are necessary in order for the government effectively to suppress the dissemination of constitutionally *unprotected* speech, such as obscenity and child pornography. "The argument . . . that protected speech may be banned as a means to ban unprotected speech . . . . turns the First Amendment upside down. The Government may not suppress lawful speech as the means to suppress unlawful speech." *Ashcroft*, — U.S. at —, 122 S. Ct. at 1404. This rule reflects the judgment that "[t]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted. . . ." *Broadrick v. Oklahoma*, 413 U.S. at 612, 93 S. Ct. 2908.

Thus, in *Ashcroft*, the Supreme Court rejected the government's argument that a statute criminalizing the distribution of constitutionally protected "virtual" child pornography, produced through computer imaging technology without the use of real children, was necessary to further the state's interest in prosecuting the dissemination of constitutionally unprotected child pornography produced using real children, since "the possibility of producing images by using computer imaging makes it very difficult for [the government] to prosecute those who produce pornography using real children." *Ashcroft*, — U.S. at —, 122 S. Ct. at 1404; *see also Stanley*, 394 U.S. at 567-58, 89 S. Ct. 1243 (holding that individuals have a First Amendment right to possess obscene material, even though the existence of this right makes it more difficult for the states to further their legitimate interest in prosecuting the distribution of obscenity). By the same token, even if the use of filters is effective in preventing patrons from receiving constitutionally unprotected speech, the government's interest in preventing the dissemination of such speech cannot justify the use of the technology protection measures mandated by CIPA, which necessarily block substantial amounts of constitutionally protected speech.

CIPA thus resembles the Communications Decency Act, which the Supreme Court facially invalidated in *Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997). Although on its face, the CDA simply restricted the distribution to minors of speech that was constitutionally unprotected with respect to minors, as a practical matter, given Web sites' difficulties in identifying the ages of Internet users, the CDA effectively prohibited the distribution to adults of material that was constitutionally protected with respect to adults.[30] Similarly, although on its face, CIPA, like the CDA, requires the suppression of only constitutionally unprotected speech, it is impossible as a practical matter, given the state of the art of filtering technology, for a public library to comply with CIPA without also blocking significant amounts of constitutionally protected speech. We therefore hold that a library's use of a technology protection measure required by CIPA is not narrowly tailored to the government's legitimate interest in preventing the dissemination of visual depictions

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[30] The Supreme Court in *Reno* explained:

> The District Court found that at the time of trial existing technology did not include any effective method for a sender to prevent minors from obtaining access to its communications on the Internet without also denying access to adults. The Court found no effective way to determine the age of a user who is accessing material through e-mail, mail exploders, newsgroups, or chat rooms. As a practical matter, the Court also found that it would be prohibitively expensive for noncommercial—as well as some commercial—speakers who have Web sites to verify that their users are adults. These limitations must inevitably curtail a significant amount of adult communication on the Internet.

Reno, 521 U.S. at 876-77, 117 S. Ct. 2329 (citation omitted).

that are obscene, child pornography, or in the case of minors, harmful to minors.

For the same reason that a public library's use of software filters is not narrowly tailored to further the library's interest in preventing its computers from being used to disseminate visual depictions that are obscene, child pornography, and harmful to minors, a public library's use of software filters is not narrowly tailored to further the library's interest in protecting patrons from being unwillingly exposed to offensive, sexually explicit material. As discussed in our findings of fact, the filters required by CIPA block substantial numbers of Web sites that even the most puritanical public library patron would not find offensive, such as *http://federo.com*, a Web site that promotes federalism in Uganda, which N2H2 blocked as "Adults Only, Pornography," and *http://www.vvm.com/bond/home.htm*, a site for aspiring dentists, which was blocked by Cyberpatrol as "Adult/Sexually Explicit." We list many more such examples in our findings of fact, *see supra*, and find that such erroneously blocked sites number in at least the thousands.

Although we have found large amounts of overblocking, even if only a small percentage of sites blocked are erroneously blocked, either with respect to the state's interest in preventing adults from viewing material that is obscene or child pornography and in preventing minors from viewing material that is harmful to minors, or with respect to the state's interest in preventing library patrons generally from being unwillingly exposed to offensive, sexually explicit material, this imprecision is fatal under the First Amendment. *Cf. Reno*, 521 U.S. at 874, 117 S. Ct. 2329 ("[T]he CDA lacks the precision that the First

Amendment requires when a statute regulates the content of speech."); *League of Women Voters*, 468 U.S. at 398, 104 S. Ct. 3106 ("[E]ven if some of the hazards at which [the challenged provision] was aimed are sufficiently substantial, the restriction is not crafted with sufficient precision to remedy those dangers that may exist to justify the significant abridgement of speech worked by the provision's broad ban. . . .").

While the First Amendment does not demand perfection when the government restricts speech in order to advance a compelling interest, the substantial amounts of erroneous blocking inherent in the technology protection measures mandated by CIPA are more than simply *de minimis* instances of human error. "The line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. Error in marking that line exacts an extraordinary cost." *Playboy*, 529 U.S. at 817, 120 S. Ct. 1878 (internal quotation marks and citation omitted). Indeed, "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967) (internal quotation marks and citation omitted); *see also Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66, 83 S. Ct. 631, 9 L. Ed. 2d 584 (1963) ("The separation of legitimate from illegitimate speech calls for sensitive tools.") (internal quotation marks and citation omitted). Where the government draws content-based restrictions on speech in order to advance a compelling government interest, the First Amendment demands the precision of a scalpel, not a sledgehammer. We believe that a public library's use of the technology protection measures mandated by CIPA is not narrowly tailored to further the governmental interests at stake.

Although the strength of different libraries' interests in blocking certain forms of speech may vary from library to library, depending on the frequency and severity of problems experienced by each particular library, we conclude, based on our findings of fact, that any public library's use of a filtering product mandated by CIPA will necessarily fail to be narrowly tailored to address the library's legitimate interests. Because it is impossible for a public library to comply with CIPA without blocking substantial amounts of speech whose suppression serves no legitimate state interest, we therefore hold that CIPA is facially invalid, even under the more stringent standard of facial invalidity urged on us by the government, which would require upholding CIPA if it is possible for just a single library to comply with CIPA's conditions without violating the First Amendment. *See supra* Part III.

C. Less Restrictive Alternatives

The constitutional infirmity of a public library's use of software filters is evidenced not only by the absence of narrow tailoring, but also by the existence of less restrictive alternatives that further the government's legitimate interests. *See Playboy*, 529 U.S. at 813, 120 S. Ct. 1878 ("If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."); *Sable*, 492 U.S. at 126, 109 S. Ct. 2829 ("The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.").

As is the case with the narrow tailoring requirement, the government bears the burden of proof in showing the ineffectiveness of less restrictive alternatives. "When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Playboy*, 529 U.S. at 816, 120 S. Ct. 1878; *see also Reno*, 521 U.S. at 879, 117 S. Ct. 2329 ("The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective. . . ."); *Fabulous Assocs., Inc. v. Pa. Pub. Util. Comm'n*, 896 F.2d 780, 787 (3d Cir. 1990) ("We focus . . . on the more difficult question whether the Commonwealth has borne its heavy burden of demonstrating that the compelling state interest could not be served by restrictions that are less intrusive on protected forms of expression.") (internal quotation marks and citation omitted).

We find that there are plausible, less restrictive alternatives to the use of software filters that would serve the government's interest in preventing the dissemination of obscenity and child pornography to library patrons. In particular, public libraries can adopt Internet use policies that make clear to patrons that the library's Internet terminals may not be used to access illegal content. Libraries can ensure that their patrons are aware of such policies by posting them in prominent places in the library, requiring patrons to sign forms agreeing to comply with the policy before the library issues library cards to patrons, and by presenting patrons, when they log on to one of the library's Internet terminals, with a screen that requires the user to

agree to comply with the library's policy before allowing the user access to the Internet.

Libraries can detect violations of their Internet use policies either through direct observation or through review of the library's Internet use logs. In some cases, library staff or patrons may directly observe a patron accessing obscenity and child pornography. Libraries' Internet use logs, however, also provide libraries with a means of detecting violations of their Internet use policies. These logs, which can be kept regardless whether a library uses filtering software, record the URL of every Web page accessed by patrons. Although ordinarily the logs do not link particular URLs with particular patrons, it is possible, using access logs, to identify the patron who viewed the Web page corresponding to a particular URL, if library staff discover in the access logs the URL of a Web page containing obscenity or child pornography. For example, David Biek, Director of Tacoma Public Library's main branch, testified that in the course of scanning Internet use logs he has found what looked like attempts to access child pornography, notwithstanding the fact that Tacoma uses Websense filtering software. In two cases, he communicated his findings to law enforcement and turned over the logs to law enforcement in response to a subpoena.[31]

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[31] To the extent that filtering software is effective in identifying URLs of Web pages containing obscenity or child pornography, libraries may use filtering software as a tool for identifying URLs in their Internet use logs that fall within these categories, without requiring patrons to use filtering software. As the study of Benjamin Edelman, an expert witness for the plaintiffs, demonstrates, it is possible to develop software that automatically tests a list of URLs, such as the list of URLs in a public library's Internet use

Once a violation of a library's Internet use policy is detected through the methods described above, a library may either issue the patron a warning, revoke the patron's Internet privileges, or notify law enforcement, if the library believes that the patron violated either state obscenity laws or child pornography laws. Although these methods of detecting use of library computers to access illegal content are not perfect, and a library, out of respect for patrons' privacy, may choose not to adopt such policies, the government has failed to show that such methods are substantially less effective at preventing patrons from accessing obscenity and child pornography than software filters. As detailed in our findings of fact, the underblocking that results from the size, rate of change, and rate of growth of the Internet significantly impairs the software filters from preventing patrons from accessing obscenity and child pornography. Unless software filters are themselves perfectly effective at preventing patrons from accessing obscenity and child pornography, "[i]t is no response that [a less restrictive alternative] . . . may not go perfectly every time." *Playboy*, 529 U.S. at 824, 120 S. Ct. 1878; *cf. Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 759, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (1996) ("No provision . . . short of an

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logs, to determine whether any of those URLs would be blocked by a particular software filter as falling within a particular category. Alternatively, library staff can review the Internet use logs by hand, skimming the list of URLs for those that are likely to correspond to Web pages containing obscenity or child pornography, as is the practice of Tacoma's David Biek, who testified as a government witness. Under either method, public libraries can assure patrons of their privacy by tracing a given URL to a particular patron only after determining that the URL corresponds to a Web site whose content is illegal.

absolute ban, can offer certain protection against assault by a determined child.").

The government has not offered any data comparing the frequency with which obscenity and child pornography is accessed at libraries that enforce their Internet use policies through software filters with the frequency with which obscenity and child pornography is accessed at public libraries that enforce their Internet use policies through methods other than software filters. Although the government's library witnesses offered anecdotal accounts of a reduction in the use of library computers to access sexually explicit speech when filtering software was mandated, these anecdotal accounts are not a substitute for more robust analyses comparing the use of library computers to access child pornography and material that meets the legal definition of obscenity in libraries that use blocking software and in libraries that use alternative methods. *Cf. Playboy*, 529 U.S. at 822, 120 S. Ct. 1878 ("[T]he Government must present more than anecdote and supposition.").

We acknowledge that some library staff will be uncomfortable using the "tap- on-the-shoulder" method of enforcing the library's policy against using Internet terminals to access obscenity and child pornography. The Greenville County Library, for example, experienced high turnover among library staff when staff were required to enforce the library's Internet use policy through the tap-on-the-shoulder technique. Given filters' inevitable underblocking, however, even a library that uses filtering will have to resort to a tap-on-the-shoulder method of enforcement, where library staff observes a patron openly violating the library's Internet use policy, by, for example, accessing material

that is obviously child pornography but that the filtering software failed to block. Moreover, a library employee's degree of comfort in using the tap-on-the-shoulder method will vary from employee to employee, and there is no evidence that it is impossible or prohibitively costly for public libraries to hire at least some employees who are comfortable enforcing the library's Internet use policy.

We also acknowledge that use of a tap on the shoulder delegates to librarians substantial discretion to determine which Web sites a patron may view. Nonetheless, we do not believe that this putative "prior restraint" problem can be avoided through the use of software filters, for they effectively delegate to the filtering company the same unfettered discretion to determine which Web sites a patron may view. Moreover, as noted above, violations of a public library's Internet use policy may be detected not only by direct observation, but also by reviewing the library's Internet use logs after the fact, which alleviates the need for library staff to directly confront patrons while they are viewing obscenity or child pornography.

Similar less restrictive alternatives exist for preventing minors from accessing material harmful to minors. First, libraries may use the tap-on-the-shoulder method when minors are observed using the Internet to access material that is harmful to minors. Requiring minors to use specific terminals, for example in a children's room, that are in direct view of library staff will increase the likelihood that library staff will detect minors' use of the Internet to access material harmful to minors. Alternatively, public libraries could require minors to use blocking software only if they are unaccompanied by a parent, or only if their parent

consents in advance to their child's unfiltered use of the Internet.[32] "A court should not assume that a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act." *Playboy*, 529 U.S. at 824, 120 S. Ct. 1878.

In contrast to the "harmful to minors" statute upheld in *Ginsberg v. New York*, 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968), which permitted parents to determine whether to provide their children with access to material otherwise prohibited by the statute, CIPA, like the Communications Decency Act, which the Court invalidated in *Reno*, contains no exception for parental consent:

> [W]e noted in *Ginsberg* that "the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children." Under the CDA, by contrast, neither the parents' consent—nor even their participation—in the communication would avoid the application of the statute.

Reno, 521 U.S. at 865, 117 S. Ct. 2329 (citation omitted); *see also Ginsberg*, 390 U.S. at 639, 88 S. Ct. 1274 ("It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." (quoting

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[32] We need not decide whether these less restrictive alternatives would themselves be constitutional. *See Fabulous Assocs., Inc. v. Pa. Pub. Util. Comm'n*, 896 F.2d 780, 787 n.6 (3d Cir. 1990) ("We intimate no opinion on the constitutionality of [a less restrictive alternative to the challenged law] . . ., inasmuch as we consider merely [its] comparative restrictiveness. . . .").

Prince v. Massachusetts, 321 U.S. 158, 166, 64 S. Ct. 438, 88 L. Ed. 645 (1944))).

The Court in *Playboy* acknowledged that although a regime of permitting parents voluntarily to block cable channels containing sexually explicit programming might not be a completely effective alternative to the challenged law, which effectively required cable operators to transmit sexually explicit programming only during particular hours, the challenged law itself was not completely effective in serving the government's interest:

> There can be little doubt, of course, that under a voluntary blocking regime, even with adequate notice, some children will be exposed to signal bleed; and we need not discount the possibility that a graphic image could have a negative impact on a young child. It must be remembered, however, that children will be exposed to signal bleed under time channeling as well. . . . The record is silent as to the comparative effectiveness of the two alternatives.

Playboy, 529 U.S. at 826, 120 S. Ct. 1878. Similarly, in this case, the government has offered no evidence comparing the effectiveness of blocking software and alternative methods used by public libraries to protect children from material harmful to minors.

Finally, there are other less restrictive alternatives to filtering software that further public libraries' interest in preventing patrons from unwillingly being exposed to patently offensive, sexually explicit content on the Internet. To the extent that public libraries are concerned with protecting patrons from accidentally encountering such material while using the Internet,

public libraries can provide patrons with guidance in finding the material they want and avoiding unwanted material. Some public libraries also offer patrons the option of using filtering software, if they so desire. *Cf. Rowan v. Post Office Dept.*, 397 U.S. 728, 90 S. Ct. 1484, 25 L. Ed. 2d 736 (1970) (upholding a federal statute permitting individuals to instruct the Postmaster General not to deliver advertisements that are "erotically arousing or sexually provocative").

With respect to protecting library patrons from sexually explicit content viewed by other patrons, public libraries have used a variety of less restrictive methods. One alternative is simply to segregate filtered from unfiltered terminals, and to place unfiltered terminals outside of patrons' sight-lines and areas of heavy traffic. Even the less restrictive alternative of allowing unfiltered access on only a single terminal, well out of the line of sight of other patrons, however, is not permitted under CIPA, which requires the use of a technology protection measure on every computer in the library. *See* CIPA § 1721(b)(6)(C) (codified at 47 U.S.C. § 254(h)(6)(C)), CIPA § 1712 (codified at 20 U.S.C. § 9134(f)(1)(A)) (requiring a public library receiving E-rate discounts or LSTA grants to certify that it "has in place a policy of Internet safety that includes the operation of a technology protection measure with respect to *any* of its computers with Internet access . . . ." (emphasis added)); *In re Federal State Joint Board on Universal Service: Children's Internet Protection Act*, CC Docket No. 96-45, Report and Order, FCC 01-120, ¶ 30 (Apr. 5, 2001) ("CIPA makes no distinction between computers used only by staff and those accessible to the public.").

Alternatively, libraries can use privacy screens or recessed monitors to prevent patrons from unwillingly being exposed to material viewed by other patrons. We acknowledge that privacy screens and recessed monitors suffer from imperfections as alternatives to filtering. Both impose costs on the library, particularly recessed monitors, which, according to the government's library witnesses, are expensive. Moreover, some libraries have experienced problems with patrons attempting to remove the privacy screens. Privacy screens and recessed monitors also make it difficult for more than one person to work at the same terminal.

These problems, however, are not insurmountable. While there is no doubt that privacy screens and recessed terminals impose additional costs on libraries, the government has failed to show that the cost of privacy screens or recessed terminals is substantially greater than the cost of filtering software and the resources needed to maintain such software. Nor has the government shown that the cost of these alternatives is so high as to make their use prohibitive. With respect to the problem of patrons removing privacy screens, we find, based on the successful use of privacy screens by the Fort Vancouver Regional Library and the Multnomah County Public Library, that it is possible for public libraries to prevent patrons from removing the screens. Although privacy screens may make it difficult for patrons to work at the same terminal side by side with other patrons or with library staff, a library could provide filtered access at terminals that lack privacy screens, when patrons wish to use a terminal with others. Alternatively, a library can reserve terminals outside of patrons' sight lines for groups of patrons who wish unfiltered access.

We therefore conclude that the government has failed to show that the less restrictive alternatives discussed above are ineffective at furthering the government's interest either in preventing patrons from using library computers to access visual depictions that are obscene, child pornography, or in the case of minors, harmful to minors, or in preventing library patrons from being unwillingly exposed to patently offensive, sexually explicit speech.

D. Do CIPA's Disabling Provisions Cure the Defect?

The Government argues that even if the use of software filters mandated by CIPA blocks a substantial amount of speech whose suppression serves no legitimate state interest, and therefore fails strict scrutiny's narrow tailoring requirement, CIPA's disabling provisions cure any lack of narrow tailoring inherent in filtering technology. The disabling provision applicable to libraries receiving LSTA grants states that "[a]n administrator, supervisor, or other authority may disable a technology protection measure . . . to enable access for bona fide research or other lawful purposes." CIPA § 1712(a)(2) (codified at 20 U.S.C. § 9134(f)(3)). CIPA's disabling provision with respect to libraries receiving E-rate discounts similarly states that "[a]n administrator, supervisor, or other person authorized by the certifying authority . . . may disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or other lawful purpose." CIPA § 1721(b) (codified at 47 U.S.C. § 254(h)(6)(D)).

To determine whether the disabling provisions cure CIPA's lack of narrow tailoring, we must first determine, as a matter of statutory construction, under

what circumstances the disabling provisions permit libraries to disable the software filters.[33] It is unclear to us whether CIPA's disabling provisions permit libraries to disable the filters any time a patron wishes to access speech that is neither obscenity, child pornography, or in the case of a minor patron, material that is harmful to minors. Whether CIPA permits disabling in such instances depends on the meaning of the provisions' reference to "bona fide research or other lawful purpose." On the one hand, the language "to enable access for bona fide research or other lawful purpose" could be interpreted to mean "to enable access to all constitutionally protected material." As a textual matter, this reading of the disabling provisions is plausible. If a patron seeks access to speech that is constitutionally protected, then it is reasonable to conclude that the patron has a "lawful purpose," since the dissemination and receipt of constitutionally protected speech cannot be made unlawful.

Moreover, since a narrower construction of the disabling provision creates more constitutional problems than a construction of the disabling provisions that permits access to all constitutionally protected speech, the broader interpretation is preferable. "[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alterna-

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[33] Whereas the disabling provision applicable to libraries that receive LSTA grants permits disabling for both adults and minors, the disabling provision applicable to libraries that receive E-rate discounts permits disabling only during adult use. Thus, the disabling provision applicable to libraries receiving E-rate discounts cannot cure the constitutional infirmity of CIPA's requirement that libraries receiving E- rate discounts use software filters when their Internet terminals are in use by minors.

tive interpretation of the statute is fairly possible, we are obligated to construe the statute to avoid such problems." *INS v. St. Cyr*, 533 U.S. 289, 121 S. Ct. 2271, 2279, 150 L. Ed. 2d 347 (2001) (internal quotation marks and citations omitted). On the other hand, interpreting CIPA's disabling provisions to permit disabling for access to all constitutionally protected speech presents several problems. First, if "other lawful purpose" means "for the purpose of accessing constitutionally protected speech," then this reading renders superfluous CIPA's reference to "bona fide research," which clearly contemplates some purpose beyond simply accessing constitutionally protected speech. In general, "courts should disfavor interpretations of statutes that render language superfluous." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992).

Furthermore, Congress is clearly capable of explicitly specifying categories of constitutionally unprotected speech, as it did when it drafted CIPA to require funding recipients to use technology protection measures that protect against visual depictions that are "obscene," "child pornography," or, in the case of minors, "harmful to minors." CIPA § 1712(a) (codified at 20 U.S.C. § 9134(f)(1)(A)(i)(I)-(III)); CIPA § 1721(b) (codified at 47 U.S.C. § 254(h)(6)(B)(i)(I)-(III)). If Congress intended CIPA's disabling provisions simply to permit libraries to disable the filters to allow access to speech falling outside of these categories, Congress could have drafted the disabling provisions with greater precision, expressly permitting libraries to disable the filters "to enable access for any material that is not obscene, child pornography, or in the case of minors, harmful to minors," rather than "to enable access for

bona fide research or other lawful purposes," which is the language that Congress actually chose.

At bottom, however, we need not definitively construe CIPA's disabling provisions, since it suffices in this case to assume without deciding that the disabling provisions permit libraries to allow a patron access to any speech that is constitutionally protected with respect to that patron. Although this interpretation raises fewer constitutional problems than a narrower interpretation, this interpretation of the disabling provisions nonetheless fails to cure CIPA's lack of narrow tailoring. Even if the disabling provisions permit public libraries to allow patrons to access speech that is constitutionally protected yet erroneously blocked by the software filters, the requirement that library patrons ask a state actor's permission to access disfavored content violates the First Amendment.

The Supreme Court has made clear that content-based restrictions that require recipients to identify themselves before being granted access to disfavored speech are subject to no less scrutiny than outright bans on access to such speech. In *Lamont v. Postmaster General*, 381 U.S. 301, 85 S. Ct. 1493, 14 L. Ed. 2d 398 (1965), for example, the Court held that a federal statute requiring the Postmaster General to halt delivery of communist propaganda unless the addressee affirmatively requested the material violated the First Amendment:

> We rest on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment rights. The addressee carries an

> affirmative obligation which we do not think the Government may impose on him. This requirement is almost certain to have a deterrent effect, especially as respects those who have sensitive positions.

Id. at 307, 85 S. Ct. 1493.

Similarly, in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (1996), the Court held unconstitutional a federal law requiring cable operators to allow access to patently offensive, sexually explicit programming only to those subscribers who requested access to the programming in advance and in writing. *Id.* at 732- 33, 116 S. Ct. 2374. As in *Lamont*, the Court in *Denver* reasoned that this content-based restriction on recipients' access to speech would have an impermissible chilling effect: "[T]he written notice requirement will . . . restrict viewing by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the 'patently offensive' channel." *Id.* at 754, 116 S. Ct. 2374; *see also Fabulous Assocs., Inc. v. Pa. Pub. Util. Comm'n*, 896 F.2d 780, 785 (3d Cir. 1990) (considering the constitutionality of a state law requiring telephone users who wish to listen to sexually explicit telephone messages to apply for an access code to receive such messages, and invalidating the law on the ground that "[a]n identification requirement exerts an inhibitory effect").

We believe that CIPA's disabling provisions suffer from the same flaws as the restrictions on speech in *Lamont*, *Denver*, and *Fabulous Associates*. By requiring library patrons affirmatively to request permission to access certain speech singled out on the basis of its content, CIPA will deter patrons from requesting that

a library disable filters to allow the patron to access speech that is constitutionally protected, yet sensitive in nature. As we explain above, we find that library patrons will be reluctant and hence unlikely to ask permission to access, for example, erroneously blocked Web sites containing information about sexually transmitted diseases, sexual identity, certain medical conditions, and a variety of other topics. As discussed in our findings of fact, software filters block access to a wide range of constitutionally protected speech, including Web sites containing information that individuals are likely to wish to access anonymously.

That library patrons will be deterred from asking permission to access Web sites containing certain kinds of content is evident as a matter of common sense as well as amply borne out by the trial record. Plaintiff Emmalyn Rood, who used the Internet at a public library to research information relating to her sexual identity, testified that she would have been unwilling as a young teen to ask a librarian to disable filtering software so that she could view materials concerning gay and lesbian issues.[34] Similarly, plaintiff Mark Brown stated that he would have been too embarrassed to ask a librarian to disable filtering software if it had impeded

[34] Software filters sometimes incorrectly block access to, *inter alia*, Web sites dealing with issues relating to sexual identity. For example, the "Gay and Lesbian Chamber of Southern Nevada," *http://www.lambdalv.com*, "a forum for the business community to develop relationships within the Las Vegas lesbian, gay transsexual, and bisexual community" was blocked by N2H2 as "Adults Only, Pornography." The home page of the Lesbian and Gay Havurah of the Long Beach, California Jewish Community Center, *http://www.compupix.com/gay/havurah.htm*, was blocked by N2H2 as "Adults Only, Pornography," by Smartfilter as "Sex," and by Websense as "Sex."

his ability to research surgery options for his mother when she was treated for breast cancer.[35] As explained in our findings of fact, *see supra* at Subsection II.D.2.b, the reluctance of patrons to request permission to access Web sites that were erroneously blocked is further established by the low number of patron unblocking requests, relative to the number of erroneously blocked Web sites, in those public libraries that use software filters and permit patrons to request access to incorrectly blocked Web sites. *Cf. Fabulous Assocs.*, 896 F.2d at 786 ("On the record before us, there is more than enough evidence to support the district court's finding that access codes will chill the exercise of some users' right to hear protected communications.").

To be sure, the government demonstrated that it is possible for libraries to permit patrons to request anonymously that a particular Web site be unblocked. In particular, the Tacoma Public Library has configured its computers to present patrons with the option, each time the software filter blocks their access to a Web page, of sending an anonymous email to library staff requesting that the page be unblocked. Moreover, a library staff member periodically scans logs of URLs blocked by the filters, in an effort to identify erroneously blocked sites, which the library will subsequently unblock. Although a public library's ability to permit anonymous unblocking requests addresses the deterrent effect of requiring patrons to identify themselves

[35] Among the types of Web sites that filters erroneously block are Web sites dealing with health issues, such as the Web site of the Willis Knighton Cancer Center, a Shreveport, Louisiana cancer treatment facility, *http://cancerftr.wkmc.com*, which was blocked by Websense under the "Sex" category.

before gaining access to a particular Web site, we believe that it fails adequately to address the over-blocking problem.

In particular, even allowing anonymous requests for unblocking burdens patrons' access to speech, since such requests cannot immediately be acted on. Although the Tacoma Public Library, for example, attempts to review requests for unblocking within 24 hours, requests sometimes are not reviewed for several days. And delays are inevitable in libraries with branches that lack the staff necessary immediately to review patron unblocking requests. Because many Internet users "surf" the Web, visiting hundreds of Web sites in a single session and spending only a short period of time viewing many of the sites, the requirement that a patron take the time to affirmatively request access to a blocked Web site and then wait several days until the site is unblocked will, as a practical matter, impose a significant burden on library patrons' use of the Internet. Indeed, a patron's time spent requesting access to an erroneously blocked Web site and checking to determine whether access was eventually granted is likely to exceed the amount of time the patron would have actually spent viewing the site, had the site not been erroneously blocked. This delay is especially burdensome in view of many libraries' practice of limiting their patrons to a half hour or an hour of Internet use per day, given the scarcity of terminal time in relation to patron demand.

The burden of requiring library patrons to ask permission to view Web sites whose content is disfavored resembles the burden that the Supreme Court found unacceptable in *Denver*, which invalidated a federal law requiring cable systems operators to block

subscribers' access to channels containing sexually explicit programming, unless subscribers requested unblocking in advance. The Court reasoned that "[t]hese restrictions will prevent programmers from broadcasting to viewers who select programs day by day (or, through 'surfing,' minute by minute). . . ." *Denver*, 518 U.S. at 754, 116 S. Ct. 2374. Similarly, in *Fabulous Associates*, the Third Circuit explained that a law preventing adults from listening to sexually explicit phone messages unless they applied in advance for access to such messages would burden adults' receipt of constitutionally protected speech, given consumers' tendency to purchase such speech on impulse. *See Fabulous Assocs.*, 896 F.2d at 785 (noting that officers of two companies that sell access to sexually explicit recorded phone messages "testified that it is usually 'impulse callers' who utilize these types of services, and that people will not call if they must apply for an access code").

In sum, in many cases, as we have noted above, library patrons who have been wrongly denied access to a Web site will decline to ask the library to disable the filters so that the patron can access the Web site. Moreover, even if patrons requested unblocking every time a site is erroneously blocked, and even if library staff granted every such request, a public library's use of blocking software would still impermissibly burden patrons' access to speech based on its content. The First Amendment jurisprudence of the Supreme Court and the Third Circuit makes clear that laws imposing content-based burdens on access to speech are no less offensive to the First Amendment than laws imposing content-based prohibitions on speech:

> It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans. . . . When the purpose and design of a statute is to regulate speech by reason of its content, special consideration or latitude is not afforded to the Government merely because the law can somehow be described as a burden rather than outright suppression.

United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 812, 826, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000) (invalidating a federal law requiring cable television operators to limit the transmission of sexually explicit programming to the hours between 10:00 p.m. and 6:00 a.m.); *see also Fabulous Assocs.*, 896 F.2d at 785 ("[H]ere . . . there is no outright prohibition of indecent communication. However, the First Amendment protects against government inhibition as well as prohibition.") (internal quotation marks and citation omitted).

Even if CIPA's disabling provisions could be perfectly implemented by library staff every time patrons request access to an erroneously blocked Web site, we hold that the content-based burden that the library's use of software filters places on patrons' access to speech suffers from the same constitutional deficiencies as a complete ban on patrons' access to speech that was erroneously blocked by filters, since patrons will often be deterred from asking the library to unblock a site and patron requests cannot be immediately reviewed. We therefore hold that CIPA's disabling provisions fail to cure CIPA's lack of narrow tailoring.

VI. Conclusion; Severability

Based upon the foregoing discussion, we hold that a public library's content-based restriction on patrons' access to speech on the Internet is subject to strict scrutiny. Every item in a library's print collection has been selected because library staff, or a party to whom staff delegates the decision, deems the content to be particularly valuable. In contrast, the Internet, as a forum, is open to any member of the public to speak, and hence, even when a library provides filtered Internet access, it creates a public forum in which the vast majority of the speech has been reviewed by neither librarians nor filtering companies. Under public forum doctrine, where the state creates such a forum open to any member of the public to speak on an unlimited number of subjects, the state's decision selectively to exclude certain speech on the basis of its content, is subject to strict scrutiny, since such exclusions risk distorting the marketplace of ideas that the state has created.

Application of strict scrutiny to public libraries' content-based restrictions on their patrons' access to the Internet finds further support in the analogy to traditional public fora, such as sidewalks, parks, and squares, in which content-based restrictions on speech are always subject to strict scrutiny. Like these traditional public fora, Internet access in public libraries uniquely promotes First Amendment values, by offering low barriers to entry to speakers and listeners. The content of speech on the Internet is as diverse as human thought, and the extent to which the Internet

promotes First Amendment values is evident from the sheer breadth of speech that this new medium enables.

To survive strict scrutiny, a public library's use of filtering software must be narrowly tailored to further a compelling state interest, and there must be no less restrictive alternative that could effectively further that interest. We find that, given the crudeness of filtering technology, any technology protection measure mandated by CIPA will necessarily block access to a substantial amount of speech whose suppression serves no legitimate government interest. This lack of narrow tailoring cannot be cured by CIPA's disabling provisions, because patrons will often be deterred from asking the library's permission to access an erroneously blocked Web page, and anonymous requests for unblocking cannot be acted on without delaying the patron's access to the blocked Web page, thereby impermissibly burdening access to speech on the basis of its content.

Moreover, less restrictive alternatives exist to further a public library's legitimate interests in preventing its computers from being used to access obscenity, child pornography, or in the case of minors, material harmful to minors, and in preventing patrons from being unwillingly exposed to patently offensive, sexually explicit speech. Libraries may use a variety of means to monitor their patrons' use of the Internet and impose sanctions on patrons who violate the library's Internet use policy. To protect minors from material harmful to minors, libraries could grant minors unfiltered access only if accompanied by a parent, or upon parental consent, or could require minors to use unfiltered terminals in view of library staff. To prevent patrons from being unwillingly exposed to offensive,

sexually explicit content, libraries can offer patrons the option of using blocking software, can place unfiltered terminals outside of patrons' sight lines, and can use privacy screens and recessed monitors. While none of these less restrictive alternatives are perfect, the government has failed to show that they are significantly less effective than filtering software, which itself fails to block access to large amounts of speech that fall within the categories sought to be blocked.

In view of the severe limitations of filtering technology and the existence of these less restrictive alternatives, we conclude that it is not possible for a public library to comply with CIPA without blocking a very substantial amount of constitutionally protected speech, in violation of the First Amendment. Because this conclusion derives from the inherent limits of the filtering technology mandated by CIPA, it holds for any library that complies with CIPA's conditions. Hence, even under the stricter standard of facial invalidity proposed by the government, which would require us to uphold CIPA if only a single library can comply with CIPA's conditions without violating the First Amendment, we conclude that CIPA is facially invalid, since it will induce public libraries, as state actors, to violate the First Amendment. Because we hold that CIPA is invalid on these grounds, we need not reach the plaintiffs' alternative theories that CIPA is invalid as a prior restraint on speech and is unconstitutionally vague. Nor need we decide whether CIPA is invalid because it requires public libraries, as a condition on the receipt of federal funds, to relinquish their own First Amendment rights to provide the public with unfiltered Internet

access, a theory that we nonetheless feel constrained to discuss (at length) in the margin.[36]

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[36] Although in light of our disposition of the plaintiffs' *Dole* claim, we do not rule upon plaintiffs' contention that CIPA's conditioning of funds on the installation of filtering software violates the doctrine of unconstitutional conditions, we are mindful of the need to frame the disputed legal issues and to develop a full factual record for the certain appeal to the Supreme Court. *Cf. Ashcroft v. ACLU*, — U.S. —, 122 S. Ct. 1700, — L. Ed. 2d — (2002) (remanding the case to the Court of Appeals to review the legal and factual bases on which the District Court granted plaintiffs' motion for a preliminary injunction after vacating its opinion that relied on a different ground from the ones used by the District Court). Although we do not decide the plaintiffs' unconstitutional conditions claim, we think that our findings of fact on public libraries, their use of the Internet, and the technological limitations of Internet filtering software, *see supra* Subsections II.D E, and our framing of the legal issue here, would allow the Supreme Court to decide the issue if it deems it necessary to resolve this case.

The doctrine of unconstitutional conditions "holds that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech' even if he has no entitlement to that benefit." *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674, 116 S. Ct. 2342, 135 L. Ed. 2d 843 (1996) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972)). In this case, the plaintiffs argue that CIPA imposes an unconstitutional condition on libraries who receive E-rate and LSTA subsidies by requiring them, as a condition on their receipt of federal funds, to surrender their First Amendment right to provide the public with access to constitutionally protected speech. Under this theory, even if it does not violate the First Amendment for a public library to use filtering software, it nonetheless violates the First Amendment for the federal government to require public libraries to use filters as a condition of the receipt of federal funds.

The government contends that this case does not fall under the unconstitutional conditions framework because: (1) as state actors, the recipients of the funds (the public libraries) are not protected

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by the First Amendment, and therefore are not being asked to relinquish any constitutionally protected rights; and (2) although library patrons are undoubtedly protected by the First Amendment, they are not the funding recipients in this case, and libraries may not rely on their patrons' rights in order to state an unconstitutional conditions claim.

It is an open question in this Circuit whether Congress may violate the First Amendment by restricting the speech of public entities, such as municipalities or public libraries. The only U.S. Supreme Court opinion to weigh in on the issue is a concurrence by Justice Stewart, joined by Chief Justice Burger and Justice Rehnquist, in which he opined that municipalities and other arms of the state are not protected by the First Amendment from governmental interference with their expression. *See Colum. Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139, 93 S. Ct. 2080, 36 L. Ed. 2d 772 (1973) (Stewart, J., concurring) ("The First Amendment protects the press *from* governmental interference; it confers no analogous protection *on* the Government."); *see also id.* at 139 n.7, 93 S. Ct. 2080 ("The purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling its own expression or that of its agents.") (quoting Thomas Emerson, *The System of Freedom of Expression* 700 (1970) (internal quotation marks omitted)). The Court has subsequently made it clear, however, that it considers it to be an open question whether municipalities acting in their capacity as employers have First Amendment rights, suggesting that the question whether public entities are ever protected by the First Amendment also remains open. *See City of Madison Joint Sch. Dist. No. 8 v. Wisc. Employment Relations Comm'n*, 429 U.S. 167, 175 n.7, 97 S. Ct. 421, 50 L. Ed. 2d 376 (1976) ("We need not decide whether a municipal corporation as an employer has First Amendment rights to hear the views of its citizens and employees.").

Several courts of appeals have cited Justice Stewart's concurrence in *Columbia Broadcasting Systems* and have, with little discussion or analysis, concluded that a "government . . . speaker is not itself protected by the first amendment." *Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634, 638 (11th Cir. 1990); *see also NAACP v. Hunt*, 891 F.2d 1555, 1565 (11th Cir.

1990) ("[T]he First Amendment protects citizens' speech only from government regulation; government speech itself is not protected by the First Amendment."); *Student Gov't Ass'n v. Bd. of Trustees of the Univ. of Mass.*, 868 F.2d 473, 481 (1st Cir. 1989) (concluding that the legal services organization run by a state university, "as a state entity, itself has no First Amendment rights"); *Estiverne v. La. State Bar Ass'n*, 863 F.2d 371, 379 (5th Cir. 1989) (noting that "the first amendment does not protect government speech").

We do not think that the question whether public libraries are protected by the First Amendment can be resolved as simply as these cases suggest. This difficulty is demonstrated by the reasoning of the Seventh Circuit in a case in which that court considered whether municipalities are protected by the First Amendment and noted that it is an open question that could plausibly be answered in the affirmative, yet declined to decide it:

> Only a few cases address the question whether municipalities or other state subdivisions or agencies have any First Amendment rights. . . . The question is an open one in this circuit, and we do not consider the answer completely free from doubt. For many purposes, for example diversity jurisdiction and Fourteenth Amendment liability, municipalities are treated by the law as if they were persons. *Monell v. Department of Social Services*, 436 U.S. 658, 690, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978); *Moor v. County of Alameda*, 411 U.S. 693, 717-18, 93 S. Ct. 1785, 36 L. Ed. 2d 596 (1973). There is at least an argument that the marketplace of ideas would be unduly curtailed if municipalities could not freely express themselves on matters of public concern, including the subsidization of housing and the demographic makeup of the community.
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> To the extent, moreover, that a municipality is the voice of its residents—is, indeed, a megaphone amplifying voices that might not otherwise be audible—a curtailment of its right to speak might be thought a curtailment of the unquestioned First Amendment rights of those residents. *See* Meir Dan Cohen, "Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State," 79 Calif. L. Rev. 1229, 1261-63 (1991); *cf. Student Government Ass'n v. Board of Trustees*, *supra*, 868 F.2d at 482. Thus if federal law imposed a fine on municipalities that passed resolutions condemning abortion, one might suppose that a genuine First Amendment issue would be presented. Against this suggestion can be cited the many cases which hold that municipalities lack standing to invoke the Fourteenth Amendment against actions by the state. E.g., *Coleman v. Miller*, 307 U.S. 433, 441, 59 S. Ct. 972, 83 L.Ed. 1385 (1939); *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 40, 53 S. Ct. 431, 77 L.Ed. 1015 (1933); *City of East St. Louis v. Circuit Court for the Twentieth Judicial Circuit*, 986 F.2d 1142, 1144 (7th Cir. 1993). But it is one thing to hold that a municipality cannot interpose the Fourteenth Amendment between itself and the state of which it is the creature, *Anderson v. City of Boston*, 376 Mass. 178, 380 N.E.2d 628, 637-38 (1978), appeal dismissed for want of a substantial federal question, 439 U.S. 1060, 99 S. Ct. 822, 59 L. Ed. 2d 26 (1979), and another to hold that a municipality has no rights against the federal government or another state. *River Vale Tp. v. Town of Orangetown*, 403 F.2d 684, 686 (2d Cir. 1968), distinguishes between these two types of cases.

Creek v. Village of Westhaven, 80 F.3d 186, 192-93 (7th Cir. 1996).

We also note that there is no textual support in the First Amendment for distinguishing between, for example, municipal corporations, and private corporations, which the Court has recognized have cognizable First Amendment rights. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 775-76, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978). Unlike other provisions in the Bill of Rights, which the Supreme Court has held to be "purely personal" and thus capable of being invoked only by individuals, the First Amendment is not phrased in terms of who holds the right, but rather what is protected. *Compare* U.S. Const. amend v. ("No *person* shall be held to answer . . .") (emphasis added) *with* U.S. Const. amend I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."); *see also United States v. White*, 322 U.S. 694, 698-701, 64 S. Ct. 1248, 88 L. Ed. 1542 (1944) (holding that the privilege against self-incrimination applies only to natural persons).

The Supreme Court relied on this distinction (i.e., that the First Amendment protects a class of speech rather than a class of speakers) in a similar context in *Bellotti*. There, the Court invalidated a Massachusetts statute that prohibited corporations from spending money to influence ballot initiatives that did not bear directly on their "property, business or assets." *Id.* at 768, 98 S. Ct. 1407. In so holding, the Court rejected the argument that the First Amendment protects only an individual's expression. The Court wrote:

> The Constitution often protects interests broader than those of the party seeking their vindication. . . . The proper question therefore is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the government is] abridg[ing] expression that the First Amendment was meant to protect.

Id. at 776, 98 S. Ct. 1407. The Court thus concluded that corporations are entitled to assert First Amendment claims as speakers, noting that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual. " *Id.* at 777, 98 S. Ct. 1407.

In view of the foregoing, the notion that public libraries may assert First Amendment rights for the purpose of making an unconstitutional conditions claim is clearly plausible, and may well be correct. But even if it is not, we think it plausible that they could rely on their patrons' rights, even though their patrons are not the ones who are directly receiving the federal funding. In similar cases, the Supreme Court has entertained unconstitutional conditions claims both by the organizations that receive federal funding and by their constituents. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 537, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001) ("Lawyers employed by New York City LSC grantees, together with private LSC contributors, LSC indigent clients, and various state and local public officials whose governments contribute to LSC grantees, brought suit . . . to declare the restriction [on LSC lawyers' ability advocate the amendment of or to challenge the constitutionality of existing welfare law] . . .

invalid."); *Rust v. Sullivan*, 500 U.S. 173, 181, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991) ("Petitioners are Title X grantees and doctors who supervise Title X funds suing on behalf of themselves and their patients. . . . Petitioners challenged the regulations on the grounds that . . . they violate the First and Fifth Amendment rights of Title X clients and the First Amendment rights of Title X health providers."); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 370 n.6, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984) (reviewing a First Amendment challenge to conditions on public broadcasters' receipt of federal funds, in which the plaintiffs included not only the owner of a public television station, but also viewers of the station's programs, including the League of Women Voters, and "Congressman Henry Waxman, . . . a regular listener and viewer of public broadcasting").

The question whether CIPA's requirement that libraries use filtering software constitutes an unconstitutional condition is not an easy one. The Supreme Court has held that it violates the First Amendment for the federal government to require public broadcasting stations that receive federal funds not to editorialize, *see League of Women Voters*, 468 U.S. at 366, 402, 104 S. Ct. 3106; for states to subsidize "newspaper and religious, professional, trade, and sports journals," but not "general interest magazines," *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 223, 107 S. Ct. 1722, 95 L. Ed. 2d 209 (1987); for a state university to subsidize student publications only on the condition that they do not "primarily promote[ ] or manifest[ ] a particular belief in or about a deity or an ultimate reality," *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 823, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995); and for the federal government to prevent legal services providers who receive federal funds from seeking to "amend or otherwise challenge existing welfare law." *Velazquez*, 531 U.S. at 537, 121 S. Ct. 1043. On the other hand, the Supreme Court has held that it does not violate the First Amendment for the federal government to require healthcare providers who receive federal funds not to "encourage, promote or advocate abortion as a method of family planning," *Rust*, 500 U.S. at 180, 111 S. Ct. 1759; for the federal government to subsidize charitable organizations only if they do not engage in lobbying activity, *see Regan v. Taxation with Representation*, 461 U.S. 540, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983); and

for the National Endowment for the Arts, in awarding grants on the basis of artistic excellence, to "take into consideration general standards of decency and respect for the diverse beliefs and values of the American Public." *NEA v. Finley*, 524 U.S. 569, 572, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998).

In light of the facts that we discuss above regarding the operation of public libraries, and the limits of Internet filtering software, *see supra* Sections II.D E, we believe that the plaintiffs have a good argument that this case is more analogous to *League of Women Voters*, *Arkansas Writers' Project*, and *Velazquez* than it is to *Rust*, *Finley* and *Taxation with Representation*. Like the law invalidated in *League of Women Voters*, which targeted editorializing, and the law invalidated in *Arkansas Writers' Project*, which targeted general interest magazines but not "religious, professional, trade, and sports journals," the law in this case places content-based restrictions on public libraries' possible First Amendment right to provide patrons with access to constitutionally protected material. *See Arkansas Writers' Project*, 481 U.S. at 229, 107 S. Ct. 1722 ("[T]he basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its *content*. Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.") (internal quotation marks and citations omitted); *League of Women Voters*, 468 U.S. at 383, 104 S. Ct. 3106 ("[T]he scope of [the challenged statute's] ban is defined solely on the basis of the content of the suppressed speech."). *See generally Rosenberger*, 515 U.S. at 828, 115 S. Ct. 2510 ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."). Because of the technological limitations of filtering software described in such detail above, Congress's requirement that public libraries use such software is in effect a requirement that public libraries block a substantial amount of constitutionally protected speech on the basis of its content.

Plaintiffs' argument that the federal government may not require public libraries who receive federal funds to restrict the availability of constitutionally protected Web sites solely on the basis of the sites' content finds further support in the role that

public libraries have traditionally served in maintaining First Amendment values. As evidenced by the many public libraries that have endorsed the Freedom to Read Statement and the Library Bill of Rights, *see supra* Subsection II.D.1, public libraries seemingly have a duty to challenge prevailing orthodoxy and make available to the public controversial, yet constitutionally protected material, even if it means drawing the ire of the community. *See Bd. of Educ. v. Pico*, 457 U.S. 853, 915, 102 S. Ct. 2799, 73 L .Ed. 2d 435 (1982) (Rehnquist, J., dissenting) (noting that "public libraries" are "designed for freewheeling inquiry").

By interfering with public libraries' discretion to make available to patrons as wide a range of constitutionally protected speech as possible, the federal government is arguably distorting the usual functioning of public libraries as places of freewheeling inquiry. The *Velazquez* Court, in invalidating the federal government's restrictions on the ability of federally funded legal services providers to challenge the constitutionality of welfare laws, relied on the manner in which the restrictions that the federal government placed on legal services' attorneys' speech distorted the usual functioning of the judicial system:

> [T]he Government seeks to use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning. . . . The First Amendment forb[ids] the Government from using the forum in an unconventional way to suppress speech inherent in the nature of the medium.

531 U.S. at 543, 121 S. Ct. 1043. By the same token, CIPA arguably distorts the usual functioning of public libraries both by requiring libraries to: (1) deny patrons access to constitutionally protected speech that libraries would otherwise provide to patrons; and (2) delegate decision making to private software developers who closely guard their selection criteria as trade secrets and who do not purport to make their decisions on the basis of whether the blocked Web sites are constitutionally protected or would add value to a public library's collection.

At all events, CIPA clearly does not seem to serve the purpose of limiting the extent of government speech given the extreme diversity of speech on the Internet. Nor can Congress's decision to

Having determined that CIPA violates the First Amendment, we would usually be required to determine whether CIPA is severable from the remainder of the statutes governing LSTA and E-rate funding. Neither party, however, has advanced the argument that CIPA is not severable from the remainder the Library Services and Technology Act and Communications Act of 1934 (the two statutes governing LSTA and E-rate funding, respectively), and at all events, we think that CIPA is severable.

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subsidize Internet access be said to promote a governmental message or constitute governmental speech, even under a generous understanding of the concept. As the Court noted in *Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997), "[i]t is no exaggeration to conclude that the content on the Internet is as diverse as human thought." *Id.* at 852, 117 S. Ct. 2329 (internal quotation marks omitted). Even with software filters in place, the sheer breadth of speech available on the Internet defeats any claim that CIPA is intended to facilitate the dissemination of governmental speech. Like in *Velazquez*, "there is no programmatic message of the kind recognized in *Rust* and which sufficed there to allow the Government to specify the advice deemed necessary for its legitimate objectives." *Velazquez*, 531 U.S. at 548, 121 S. Ct. 1043.

In sum, we think that the plaintiffs have good arguments that they may assert an unconstitutional conditions claim by relying either on the public libraries' First Amendment rights or on the rights of their patrons. We also think that the plaintiffs have a good argument that CIPA's requirement that public libraries use filtering software distorts the usual functioning of public libraries in such a way that it constitutes an unconstitutional condition on the receipt of funds. We do not decide these issues, confident that our findings of fact on the functioning of public libraries, their use of the Internet, and the technological limitations of Internet filtering software, *see supra* Sections II.D E, would allow the Supreme Court to decide the unconstitutional conditions claim if the Court deems it necessary.

"The inquiry into whether a statute is severable is essentially an inquiry into legislative intent." *Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999). "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Buckley v. Valeo*, 424 U.S. 1, 108, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (internal quotation marks and citation omitted). There is no doubt that if we were to strike CIPA from the sections of the United States Code where it is currently codified, the remaining statutory sections, providing eligible public libraries with E-rate discounts and LSTA grants, would be fully operative as law. Indeed, the LSTA and E-rate programs existed prior to the enactment of CIPA in substantially the same form as they would exist were we to strike CIPA and leave the rest of the programs intact.

The second question, whether Congress would in this case have chosen to repeal the LSTA and E-rate subsidy programs instead of continuing to fund them if it had known that CIPA's limitations on these programs were constitutionally invalid, is less clear. CIPA contains "separability" clauses that state that if any of its additions to the statutes governing the LSTA and E-rate programs are found to be unconstitutional, Congress intended to effectuate as much of CIPA's amendments as possible.[37] We interpret these clauses to

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[37] CIPA § 1712(a)(2) contains a provision titled "Separability," which is codified in the Library Services and Technology Act, 20 U.S.C. § 9134(f)(6), and provides: "If any provision of this subsection is held invalid, the remainder of this subsection shall not be affected thereby." CIPA section 1721(e) also contained a similar

mean, for example, that if a court were to find that CIPA's requirements are unconstitutional with respect to adult patrons, but permissible with respect to minors, that Congress intended to have the court effectuate only the provisions with respect to minors. These separability clauses do not speak to the situation before us, however, where we have found that CIPA is facially unconstitutional in its entirety.

Nevertheless, the government has not pointed to anything in the legislative history or elsewhere to suggest that Congress intended to discontinue funding under the LSTA and E-rate programs unless it could effectuate CIPA's restrictions on the funding. And Congress's decision, prior to CIPA's enactment, to subsidize Internet access through the LSTA and E-rate programs without such restrictions, counsels that we reach the opposite conclusion. At bottom, we think that it is unclear what Congress's intent was on this point, and in the absence of such information, we exercise a presumption in favor of severability. *Regan v. Time, Inc.*, 468 U.S. 641, 653, 104 S. Ct. 3262, 82 L. Ed. 2d 487 (1984) ("[T]he presumption is in favor of severability."); *cf. Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 773 (2d Cir. 1999), *aff'd* 531 U.S. 533, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001) (applying a presumption in favor of severability in the face of uncertainty whether Congress intended to fund the Legal Services Corporation even if a restriction on the funding was to be declared invalid).

provision that applied to E-rate funding, although it was not codified in the Communications Act. That section, also titled "Separability," provided: "If any provision of paragraph (5) or (6) of section 254(h) of the Communications Act of 1934, as amended by this section, or the application thereof to any person or circumstance is held invalid, the remainder of such paragraph and the application of such paragraph to other persons or circumstances shall not be affected thereby." CIPA § 1721(e).

For the foregoing reasons, we will enter a final judgment declaring Sections 1712(a)(2) and 1721(b) of the Children's Internet Protection Act, codified at 20 U.S.C. § 9134(f) and 47 U.S.C. § 254(h)(6), respectively, to be facially invalid under the First Amendment and permanently enjoining the defendants from enforcing those provisions.

ORDER

AND NOW, this 31st day of May, 2002, based on the foregoing findings of fact and conclusions of law, it is hereby ORDERED that:

(1) judgment is entered in favor of the plaintiffs and against the defendants, declaring that § § 1712(a)(2) and 1721(b) of the Children's Internet Protection Act, 20 U.S.C. § 9134(f) and 47 U.S.C. § 254(h)(6), are facially invalid under the First Amendment to the United States Constitution; and

(2) the United States, Michael Powell, in his official capacity as Chairman of the Federal Communications Commission, the Federal Communications Commission, Beverly Sheppard, in her official capacity as Acting Director of the Institute of Museum and Library Services, and the Institute of Museum and Library Services are permanently enjoined from withholding federal funds from any public library for failure to comply with §§ 1712(a)(2) and 1721(b) of the Children's Internet Protection Act, 20 U.S.C. § 9134(f) and 47 U.S.C. § 254(h)(6).

APPENDIX B

STATUTORY PROVISIONS INVOLVED

1. 20 U.S.C. 9121 provides in pertinent part:

Purpose

It is the purpose of this subchapter—

(1) to consolidate Federal library service programs;

(2) to stimulate excellence and promote access to learning and information resources in all types of libraries for individuals of all ages;

(3) to promote library services that provide all users access to information through State, regional, national and international electronic networks;

(4) to provide linkages among and between libraries; and

(5) to promote targeted library services to people of diverse geographic, cultural, and socioeconomic backgrounds, to individuals with disabilities, and to people with limited functional literacy or information skills.

* * * * *

2. 20 U.S.C. 9122 provides in pertinent part:

Definitions

As used in this subchapter:

* * * * *

(2) Library

The term "library" includes—

(A) a public library;

(B) a public elementary school or secondary school library;

(C) an academic library;

(D) a research library, which for the purposes of this subchapter means a library that—

(i) makes publicly available library services and materials suitable for scholarly research and not otherwise available to the public; and

(ii) is not an integral part of an institution of higher education; and

(E) a private library or other special library, but only if the State in which such private or special library is located determines that the library should be considered a library for purposes of this subchapter.

* * * * *

3. 20 U.S.C. 9133 provides in pertinent part:

Payments; Federal share; and maintenance of effort requirements

(a) Payments

Subject to appropriations provided pursuant to section 9123 of this title, the Director shall pay to each State library administrative agency having a State plan approved under section 9134 of this title the Federal share of the cost of the activities described in the State plan.

(b) Federal share

(1) In general

The Federal share shall be 66 percent.

* * * * *

4. 20 U.S.C. 9134 provides in pertinent part:

State plans

(a) State plan required

(1) In general

In order to be eligible to receive a grant under this subchapter, a State library administrative agency shall submit a State plan to the Director not later than April 1, 1997.

* * * * *

(b) Contents

The State plan shall—

(1) establish goals, and specify priorities, for the State consistent with the purposes of this subchapter;

(2) describe activities that are consistent with the goals and priorities established under paragraph (1), the purposes of this subchapter, and section 9141 of this title, that the State library administrative agency will carry out during such year using such grant;

* * * * *

(f) Internet safety

(1) In general

No funds made available under this Act for a library described in section 9122(2)(A) or (B) of this title that does not receive services at discount rates under section 254(h)(6) of Title 47 may be used to purchase computers used to access the Internet, or to pay for direct costs associated with accessing the Internet, for such library unless—

(A) such library—

(i) has in place a policy of Internet safety for minors that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are—

(I) obscene;

(II) child pornography; or

(III) harmful to minors; and

(ii) is enforcing the operation of such technology protection measure during any use of such computers by minors; and

(B) such library—

(i) has in place a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with

Internet access that protects against access through such computers to visual depictions that are—

(I) obscene; or

(II) child pornography; and

(ii) is enforcing the operation of such technology protection measure during any use of such computers.

(2) Access to other materials

Nothing in this subsection shall be construed to prohibit a library from limiting Internet access to or otherwise protecting against materials other than those referred to in subclauses (I), (II), and (III) of paragraph (1)(A)(i).

(3) Disabling during certain use

An administrator, supervisor, or other authority may disable a technology protection measure under paragraph (1) to enable access for bona fide research or other lawful purposes.

* * * * *

(7) Definitions

In this section:

(A) Child pornography

The term "child pornography" has the meaning given such term in section 2256 of Title 18.

(B) Harmful to minors

The term "harmful to minors" means any picture, image, graphic image file, or other visual depiction that—

(i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;

(ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and

(iii) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.

(C) Minor

The term "minor" means an individual who has not attained the age of 17.

(D) Obscene

The term "obscene" has the meaning given such term in section 1460 of Title 18.

(E) Sexual act; sexual contact

The terms "sexual act" and "sexual contact" have the meanings given such terms in section 2246 of Title 18.

* * * * *

5. 20 U.S.C. 9141 provides in pertinent part:

Grants to States

(a) In general

Of the funds provided to a State library administrative agency under section 9123 of this title, such agency shall expend, either directly or through subgrants or cooperative agreements, at least 96 percent of such funds for—

(1) (A) establishing or enhancing electronic linkages among or between libraries;

(B) electronically linking libraries with educational, social, or information services;

(C) assisting libraries in accessing information through electronic networks;

(D) encouraging libraries in different areas, and encouraging different types of libraries, to establish consortia and share resources; or

(E) paying costs for libraries to acquire or share computer systems and telecommunications technologies; and

(2) targeting library and information services to persons having difficulty using a library and to underserved urban and rural communities, including children (from birth through age 17) from families with incomes below the poverty line (as defined by the Office of Management and Budget and revised annually in accordance with section 9902(2) of Title 42) applicable to a family of the size involved.

* * * * *

6. 47 U.S.C. 254, as amended by Pub. L. No. 106-554, App. D, 114 Stat. 2763A-343 provides in pertinent part:

Universal service

* * * * *

(h) Telecommunications services for certain providers

(1) In general

* * * * *

(B) Educational providers and libraries

All telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service under subsection (c)(3) of this section, provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties. The discount shall be an amount that the Commission, with respect to interstate services, and the States, with respect to intrastate services, determine is appropriate and necessary to ensure affordable access to and use of such services by such entities. A telecommunications carrier providing service under this paragraph shall—

* * * * *

(6) Requirements for certain libraries with computers having internet access

(A) Internet safety

(i) In general

Except as provided in clause (ii), a library having one or more computers with Internet access may not receive services at discount rates under paragraph (1)(B) unless the library—

(I) submits to the Commission the certifications described in subparagraphs (B) and (C); and

(II) submits to the Commission a certification that an Internet safety policy has been adopted and implemented for the library under subsection (l); and

(III) ensures the use of such computers in accordance with the certifications.

(ii) Applicability

The prohibition in clause (i) shall not apply with respect to a library that receives services at discount rates under paragraph (1)(B) only for purposes other than the provision of Internet access, Internet service, or internal connections.

* * * * *

(B) Certification with respect to minors

A certification under this subparagraph is a certification that the library—

(i) is enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are—

(I) obscene;

(II) child pornography; or

(III) harmful to minors; and

(ii) is enforcing the operation of such technology protection measure during any use of such computers by minors.

(C) Certification with respect to adults

A certification under this paragraph is a certification that the library—

(i) is enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are—

(I) obscene; or

(II) child pornography; and

(ii) is enforcing the operation of such technology protection measure during any use of such computers.

(D) Disabling during adult use

An administrator, supervisor, or other person authorized by the certifying authority under subparagraph (A)(i) may disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or other lawful purpose.

* * * * *

(7) Definitions

For purposes of this subsection:

* * * * *

(D) Minor

The term "minor" means any individual who has not attained the age of 17 years.

(E) Obscene

The term "obscene" has the meaning given such term in section 1460 of Title 18.

(F) Child pornography

The term "child pornography" has the meaning given such term in section 2256 of Title 18.

(G) Harmful to minors

The term "harmful to minors" means any picture, image, graphic image file, or other visual depiction that—

(i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;

(ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and

(iii) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.

(H) Sexual act; sexual contact

The terms "sexual act" and "sexual contact" have the meanings given such terms in section 2246 of Title 18.

(I) Technology protection measure

The term "technology protection measure" means a specific technology that blocks or filters Internet access to the material covered by a certification under paragraph (5) or (6) to which such certification relates.

* * * * *

(*l*) Internet safety policy requirement for schools and libraries

(1) In general

In carrying out its responsibilities under subsection (h), each school or library to which subsection (h) applies shall—

(A) adopt and implement an Internet safety policy that addresses—

(i) access by minors to inappropriate matter on the Internet and World Wide Web;

(ii) the safety and security of minors when using electronic mail, chat rooms, and other forms of direct electronic communications;

(iii) unauthorized access, including so-called "hacking", and other unlawful activities by minors online;

(iv) unauthorized disclosure, use, and dissemination of personal identification information regarding minors; and

(v) measures designed to restrict minors' access to materials harmful to minors; and

(B) provide reasonable public notice and hold at least one public hearing or meeting to address the proposed Internet safety policy.

(2) Local determination of content

A determination regarding what matter is inappropriate for minors shall be made by the school board, local educational agency, library, or other authority responsible for making the determination. No agency or instrumentality of the United States Government may—

(A) establish criteria for making such determination;

(B) review the determination made by the certifying school, school board, local educational agency, library, or other authority; or

(C) consider the criteria employed by the certifying school, school board, local educational agency, library, or other authority in the administration of subsection (h)(1)(B).

(3) Availability for review

Each Internet safety policy adopted under this subsection shall be made available to the Commission, upon request of the Commission, by the school, school

board, local educational agency, library, or other authority responsible for adopting such Internet safety policy for purposes of the review of such Internet safety policy by the Commission.

* * * * *

7. Act of Dec. 21, 2000, Pub. L. No. 106-554, Tit. XVII, 114 Stat. 2763A-335

§ 1702. Disclaimers

(a) Disclaimer Regarding Content.—Nothing in this title or the amendments made by this title shall be construed to prohibit a local educational agency, elementary or secondary school, or library from blocking access on the Internet on computers owned or operated by that agency, school, or library to any content other than content covered by this title or the amendments made by this title.

(b) Disclaimer Regarding Privacy.—Nothing in this title or the amendments made by this title shall be construed to require the tracking of Internet use by any identifiable minor or adult user.

* * * * *

§ 1721. Requirement for Schools and Libraries to Enforce Internet Safety Policies with Technology Protection Measures for Computers with Internet Access as Condition of Universal Service Discounts.

* * * * *

(e) Separability.—If any provision of paragraph (5) or (6) of section 254(h) of the Communications Act of 1934, as amended by this section, or the application thereof to any person or circumstance is held invalid, the remainder of such paragraph and the application of such paragraph to other persons or circumstances shall not be affected thereby.

(f) Regulations.—

(1) Requirement.—The Federal Communications Commission shall prescribe regulations for purposes of administering the provisions of paragraphs (5) and (6) of section 254(h) of the Communications Act of 1934, as amended by this section.

(2) Deadline.—Notwithstanding any other provision of law, the Commission shall prescribe regulations under paragraph (1) so as to ensure that such regulations take effect 120 days after the date of the enactment of this Act.

* * * * *

§ 1733. Implementing Regulations

Not later than 120 days after the date of enactment of this Act, the Federal Communications Commission shall prescribe regulations for purposes of section 254(1) of the Communications Act of 1934, as added by section 1732 of this Act.

* * * * *

§ 1741. Expedited Review

(a) THREE-JUDGE DISTRICT COURT HEARING.—Notwithstanding any other provision of law, any civil action challenging the constitutionality, on its face, of this title or any amendment made by this title, or any provision thereof, shall be heard by a district court of three judges convened pursuant to the provisions of section 2284 of title 28, United States Code.

(b) APPELLATE REVIEW.—Notwithstanding any other provision of law, an interlocutory or final judgment, decree, or order of the court of three judges in an action under subsection (a) holding this title or an amendment made by this title, or any provision thereof, unconstitutional shall be reviewable as a matter of right by direct appeal to the Supreme Court. Any such appeal shall be filed not more than 20 days after entry of such judgment, decree, or order.

This Act may be cited as the "Miscellaneous Appropriations Act, 2001."

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 01-CV-1303

AMERICAN LIBRARY ASSOCIATION, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Civil Action No. 01-CV-1322

MULTNOMAH COUNTY PUBLIC LIBRARY, ET AL.,
PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

[Filed: June 20, 2002]

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

Notice is hereby given that the United States of America, the Federal Communications Commission, the Institute of Museum and Library Services, Michael K. Powell, in his capacity as Chairman of the Federal Communications Commission, and Robert S. Martin, in

his capacity as Director of the Institute of Museum and Library Services (hereinafter "defendants"),[1] hereby appeal to the United States Supreme Court from the Order entered in these consolidated actions on the 31st day of May, 2002. The May 31, 2002, Order: (1) entered judgment in favor of plaintiffs, (2) declared §§ 1712(a)(2) and 1721(b) of the Children's Internet Protection Act ("CIPA"), as codified at 20 U.S.C. § 9134(f) and 47 U.S.C. § 254(h)(6), facially invalid under the First Amendment of the United States Constitution, and (3) permanently enjoined defendants from withholding federal funds from any public library for failure to comply with §§ 1712(a)(2) and 1721(b) of CIPA, as codified at 20 U.S.C. § 9134(f) and 47 U.S.C. § 254(h)(6). A direct appeal to the United States Supreme Court is authorized by section 1741(b) of the Children's Internet Protection Act ("CIPA"), Title XVII, App. D, Pub. L. No. 106-554, 114 Stat. 2763 *et seq.*

Respectfully submitted,

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PATRICK L. MEEHAN
United States Attorney

---

[1] Pursuant to Federal Rule of Civil Procedure 25(d)(1), Robert S. Martin is automatically substituted for the originally named defendant Beverly Sheppard as her successor in office. This Notice of Appeal serves to preserve an appeal on behalf of all defendants and their respective successors in office.

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Dated: June 19, 2002

No. 02-361

Supreme Court, U.S.
FILED
OCT 7 2002
CLERK

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *et al.*,
Appellants,

v.

AMERICAN LIBRARY ASSOCIATION, INC., *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

MOTION TO AFFIRM OF APPELLEES AMERICAN LIBRARY ASSOCIATION, ET AL.

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether the Children's Internet Protection Act (CIPA) induces public libraries to violate the First Amendment.

2. Whether CIPA imposes unconstitutional conditions on funding to public libraries and their patrons in violation of the First Amendment.

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Appellees American Library Association, *et al.*, respectfully submit this response to the government's jurisdictional statement.[1] As shown below, the provisions of the Children's Internet Protection Act ("CIPA") that condition federal funding to public libraries on the installation and use of content blocking software on all library Internet terminals violate the First Amendment. Although the Act purports to be confined to unprotected expression, the district court's extensive factual findings – which the government barely acknowledges in its jurisdictional statement – establish that any library attempting to comply with CIPA would end up blocking access to vast amounts of protected speech. The Web sites blocked include both (1) sexually explicit but non-obscene sites that the filtering companies intend to block and (2) thousands of other Web pages that do not even remotely resemble the expression the companies say they are targeting. Because of the rapid growth and dynamic nature of the Internet and the systemic shortcomings of the filtering process, blocking software is inherently incapable of avoiding both kinds of "overblocking." Moreover, as the district court found, libraries have available options for managing public Internet access that are much less restrictive than mandatory blocking – and just as effective at serving any legitimate governmental interest at stake.

Based on these facts, the district court correctly concluded that CIPA induces public libraries to violate the First

---

[1]Appellees joining this brief are: American Library Association, Inc.; Freedom to Read Foundation; Alaska Library Association; California Library Association; New England Library Association; New York Library Association; Association of Community Organizations for Reform Now; Friends of the Philadelphia City Institute Library; Pennsylvania Alliance for Democracy; Elizabeth Hrenda; and C. Donald Weinberg ("ALA Appellees"). Pursuant to Rule 29(6) of this Court, ALA Appellees state that there is no parent or publicly held company owning 10% or more of any ALA Appellee.

Amendment rights of patrons, rendering this funding statute invalid under *South Dakota v. Dole*, 483 U.S. 203 (1987). In addition, as suggested but not conclusively decided by the district court, CIPA's funding restrictions impose an unconstitutional condition on public libraries and their patrons that distorts the usual functioning of libraries that choose to offer the uniquely diverse medium of the Internet.

For these reasons, the district court's judgment was plainly correct and should, in our view, be summarily affirmed. Nevertheless, appellees appreciate that this case raises important constitutional questions regarding Congress's latest attempt to restrict speech on the Internet. The Court may therefore prefer to note probable jurisdiction and undertake a more comprehensive examination of the First Amendment implications of the "technology protection measures" required by CIPA. We respond here to appellants' criticisms of the district court's decision, in order to assist the Court in making that determination.

STATEMENT

A. The Statutory Framework

CIPA profoundly alters two pre-existing federal funding schemes: Library Services and Technology Act ("LSTA") grants, *see* 20 U.S.C. § 9101 *et seq.*, and the FCC-administered "universal service" or "E-rate" program, *see* 47 U.S.C. § 254(h). As the government and the district court's decision recognize, both programs have contributed significantly to the increased availability of Internet access in public libraries, especially in low-income communities. *See* J.S. at 3; J.S. App. 4a, 36a. Prior to the enactment of CIPA, neither the LSTA program nor the E-rate discount scheme imposed conditions or restrictions on the content of the Internet access funded by those programs.

CIPA requires public libraries to install and use content blocking software on all library Internet terminals as a condition of receiving LSTA and E-rate funds. Under the provisions challenged by plaintiffs and invalidated by the district court,[2] a public library receiving federal Internet funding under the LSTA or E-rate programs must install and use Internet blocking software on "*any* of its computers with Internet access," 20 U.S.C. §§ 9134(f)(1)(A)(i), 9134(f)(1)(B)(i) (for LSTA) (emphasis added); 47 U.S.C. §§ 254(h)(6)(B)(i), 254(h)(6)(C)(i) (for E-rate) (emphasis added), "during *any use* of such computers," 20 U.S.C. §§ 9134(f)(1)(A)(ii), 9134(f)(1)(B)(ii) (for LSTA) (emphasis added); 47 U.S.C. §§ 254(h)(6)(B)(ii), 254(h)(6)(C)(ii) (for E-rate) (emphasis added). This sweeping requirement covers not only adult and minor patrons, but also library staff. *See In re Federal-State Joint Board on Universal Service*, 16 F.C.C.R. 8182, ¶ 30 (2001). CIPA's mandate, moreover, is not limited to federally funded computers or Internet access. Rather, if a public library receives any LSTA or E-rate Internet funding, however small, *all* of the library's Internet access falls within the Act's ambit. The blocking software must be designed to prevent access to obscenity, child pornography, and, for minor patrons, speech that is "harmful to minors." 20 U.S.C. § 9134(f)(1); 47 U.S.C. § 254(h)(6).

CIPA does contain several disabling provisions that permit libraries to disable the software "to enable access for bona fide research or other lawful purposes." 20 U.S.C. § 9134(f)(3); 47 U.S.C. § 254(h)(6)(D). But the Act does not *require* libraries to disable under those circumstances, nor does it define or provide any additional guidance explaining the terms "bona fide research" or "other lawful purposes."

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[2]Plaintiffs did not challenge, and the district court did not address, CIPA's restrictions on public school Internet funding.

B. Evidence Available to Congress

When Congress passed CIPA in 2000, it did not act on the basis of evidence that blocking software is an effective response to concerns about patrons' access to unprotected speech in the library setting. Contrary to the suggestion made in appellants' jurisdictional statement, *see* J.S. at 3-4, Congress had no evidence that blocking software works as advertised, let alone as CIPA requires. In fact, the only federally sanctioned study of blocking software at the time – a report by the federal Commission on Child Online Protection ("COPA Commission Report") – declined to endorse the mandatory use of blocking software, concluding that "no single technology or method will effectively protect children from harmful material online." COPA Commission Report, Oct. 20, 2000, at 9; *see also, e.g.*, *id.* at 19-20, 21, 22 (concluding that blocking technology "raises First Amendment concerns because of its potential to be over-inclusive in blocking content," and that "[c]oncerns are increased because the extent of blocking is often unclear and not disclosed"). Indeed, far from acting on the basis of evidence, Congress in CIPA mandated that the National Telecommunications and Information Administration *begin* evaluating blocking software eighteen months *after* the enactment of CIPA. *See* CIPA, Pub. L. No. 106-551, Div. B., Tit. XVII, 114 Stat. 2763A-335, § 1703.

C. The Three-Judge District Court's Decision

The district court's conclusion that CIPA's requirements violate the First Amendment was based on the court's extensive findings of fact, made after a two-week trial during which the court heard from twenty witnesses and received voluminous exhibits. Those findings, which the government largely ignores, establish that any available filtering software a library might install would block an enormous amount of protected

expression and that such speech restrictions cannot be justified as necessary to serve any compelling governmental interest.

1. *Ineffectiveness of filtering software.* The government does not dispute that blocking software is the only real option available to libraries seeking to comply with CIPA. Once installed on a library's computer network, filtering software will prevent patrons from viewing a Web page if that page is included on the software's pre-established list of pages or sites to be blocked. Those lists, in turn, include a large number of sites that do not match the categories of expression supposedly targeted by CIPA – *i.e.*, obscenity, child pornography, and (for children) "harmful to minors" materials. The district court found that "no category definition used by filtering software companies is identical to CIPA's definitions of visual depictions that are obscene, child pornography, or harmful to minors." J.S. App. 51a. Instead, the companies simply attempt to block sites that are sexually explicit.

Moreover, even leaving aside the complete lack of any relationship to the legal categories of unprotected speech listed in CIPA, the district court found that blocking software is wholly ineffective *on its own terms*. Based on extensive testimony about how filters work and on studies of filters' accuracy, the district court found that blocking software is plagued by problems of significant "overblocking" of Web content that does not meet the filter's categories. Blocking software also produces "underblocking," in that it fails to block substantial amounts of material that would fall within the filter's categories. *See, e.g.*, *id.* 3a. The district court found that these flaws inhere in the nature of the Web and the way in which filtering companies compile their blocked sites lists. "[I]t is currently impossible, given the Internet's size, rate of growth, rate of change, and architecture, and given the state of the art of automated classification systems, to develop a filter

that neither underblocks nor overblocks a substantial amount of speech." *Id.* 68a.

In so finding, the district court credited testimony of experts presented by both sides, who demonstrated the myriad flaws endemic to filtering software. As the court noted, the government's *own* expert study of the use of blocking software in three libraries, although skewed to underestimate the rate of overblocking, showed an overblocking rate of up to 15% – *i.e.*, 15% of the Web sites that patrons tried to access but were blocked did not meet the filtering companies' own category definitions. *See id.* 72a-73a, 78a-79a. The district court also credited plaintiffs' expert study identifying thousands of pages that were blocked by currently available software but would be of use or value in a public library. *Id.* 68a. In summarizing its evaluation of the expert reports, the district court stated:

> The inaccuracies that result from these limitations of filtering technology are quite substantial. At least tens of thousands of pages of the indexable Web are overblocked by each of the filtering programs evaluated by experts in this case, even when considered against the filtering companies' own category definitions. Many erroneously blocked pages contain content that is completely innocuous for both adults and minors, and that no rational person could conclude matches the filtering companies' category definitions, such as "pornography" or "sex."
>
> The number of overblocked sites is of course much higher with respect to the definitions of obscenity and child pornography that CIPA employs for adults, since the filtering products' category definitions, such as "sex" and "nudity," encompass vast amounts of Web pages that are neither child pornography nor obscene.

Id. 93a.[3]

2. *The Internet in the public library.* The district court also made a number of key factual findings concerning the traditional role and current practices of public libraries, and the manner in which libraries offer Internet access to their patrons.

As the district court found, public libraries "generally share a common mission – to provide patrons with a wide range of information and ideas." *Id.* 32a. That mission is not restricted to "education," *see* J.S. at 3, 14-15, but rather, "[p]ublic libraries provide information not only for educational purposes, but also for recreational, professional, and other purposes." J.S. App. 33a. Indeed, the government concedes that libraries "serve broader community interests" by providing materials to their patrons that go far beyond educational materials. J.S. at

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[3]The thousands of Web pages that the district court found "no rational person could conclude match[] the filtering companies' category definitions," J.S. App. 93a, are too numerous to list here, but include, for example: "Orphanage Emmanuel, a Christian orphanage in Honduras that houses 225 children," blocked by Cyber Patrol in the "Adult/Sexually Explicit" category; "Vision Art Online, which sells wooden wall hangings for the home that contain prayers, passages from the Bible, and images of the Star of David," blocked in Websense's "Sex" category; "the home page of the Lesbian and Gay Havurah of the Long Beach, California Jewish Community Center," blocked by N2H2 as "Adults Only, Pornography," by Smartfilter and Websense as "Sex"; the Web site for Bob Coughlin, a town selectman in Dedham, Massachusetts," blocked under N2H2's "Nudity" category; "the Web site for Wisconsin Right to Life," blocked by N2H2 blocked "Nudity"; "the Western Amputee Support Alliance Home Page," blocked by N2H2 as "Pornography"; "the Web site of the Willis-Knighton Cancer Center, a Shreveport, Louisiana cancer treatment facility," blocked by Websense under the "Sex" category; "and a site dealing with halitosis," blocked by N2H2 as "Adults, Pornography," by Smartfilter as "Sex," by Cyber Patrol as "Adult/Sexually Explicit," and by Websense as "Adult Content"; and "Southern Alberta Fly Fishing Outfitters," blocked by N2H2 as "Pornography." *Id.* 86a-89a.

14. To that end, individual libraries not only provide as much information as their resources and space will allow, but also draw upon the collections of other libraries through an extensive interlibrary loan system. *See* J.S. App. 34a.

Consistent with their mission to widen the world of information available to patrons, "approximately 95% of all public libraries provide public access to the Internet." *Id.* 37a (citation omitted). As the district court recognized, "[p]ublic libraries play an important role in providing Internet access to citizens who would not otherwise possess it. Of the 143 million Americans using the Internet, approximately 10%, or 14.3 million people, access the Internet at a public library." *Id.* 36a. Access to the Internet through the public library is particularly important for people with lower incomes: "About 20.3% of Internet users with household family income of less than $15,000 per year use public libraries for Internet access." *Id.* 36a-37a. Public funding thus is of critical importance to ensuring that people from all income levels have access to the Internet, as reflected in the fact that "[a]pproximately 70% of libraries serving communities with poverty levels in excess of 40% receive E-rate discounts." *Id.* 37a.

The district court found that the vast majority of libraries employ less restrictive measures to ensure that patrons do not access illegal speech and to protect children from materials considered harmful to minors. These measures include "channeling patrons' Internet use" by training patrons on use of the Web, and by directing patrons to the library's home Web page which contains links to recommended sites, *id.* 41a; shielding computer screens from the view of passersby through physical positioning of the terminals, and through the use of privacy screens and recessed monitors, *id.* 42a-43a; ensuring the enforcement of library Internet use policies by placing computer terminals in well-trafficked areas, *id.* 42a-44a;

segregating computers used by children, *id.* 44a; offering the optional use of blocking software, *id.* 45a; and allowing parents to decide whether their children will use terminals with blocking software, *id.*

3. *The district court's legal conclusions.* Based on its findings about the role of public libraries in providing Internet access, and the inherent flaws of filtering software that result in the wrongful blocking of a substantial amount of protected speech, the district court concluded that CIPA would induce public libraries to violate the First Amendment rights of their patrons, and thus does not constitute a valid exercise of Congress's spending power under *South Dakota v. Dole*, 483 U.S. 203 (1987). The court held that CIPA was not narrowly tailored to the government's purported compelling interest in protecting library patrons from directly or inadvertently viewing images that are obscene, child pornography, or, in the case of patrons under 17, harmful to minors. J.S. App. 148a-157a. The court also determined that the government failed to carry its heavy burden of demonstrating the absence of any other less restrictive alternatives to mandatory filtering. Indeed, evidence at trial showed that most libraries employ a wide variety of less restrictive methods for serving the government's asserted interests. *Id.* 157a-167a.

The court also rejected the government's argument that any constitutional infirmities were cured by the Act's disabling provisions. *Id.* 167a-177a. To the contrary, the district court held that CIPA's requirement that patrons seek librarians' permission to view material on the Internet was in itself unconstitutional under this Court's decisions in *Lamont v. Postmaster General*, 381 U.S. 301 (1965) and *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996). J.S. App. 170a-171a. Finally, although finding it unnecessary for its holding invalidating CIPA, the

district court observed in a lengthy footnote that plaintiffs "have a good argument that CIPA's requirement that public libraries use filtering software distorts the usual functioning of public libraries in such a way that it constitutes an unconstitutional condition on the receipt of funds." *Id.* 180a-188a n.36.

REASONS TO AFFIRM

I. THE DISTRICT COURT'S DECISION THAT CIPA VIOLATES THE FIRST AMENDMENT RIGHTS OF LIBRARY PATRONS AND THEREFORE CANNOT BE SUSTAINED AS A VALID EXERCISE OF CONGRESS'S SPENDING POWER SHOULD BE AFFIRMED.

As the government concedes, the district court properly analyzed CIPA under the framework established in *South Dakota v. Dole*, 483 U.S. 203 (1987). Under *Dole*, when Congress distributes funds to state and local government entities, it cannot do so in a way that "induce[s] [those entities] to engage in activities that would themselves be unconstitutional." *Id.* at 210. The district court concluded that CIPA was facially invalid because it would require public libraries receiving federal funds to violate the First Amendment rights of their patrons. As the court explained, "[b]ecause of the inherent limitations in filtering technology, public libraries can never comply with CIPA without blocking access to a substantial amount of speech that is both constitutionally protected and fails to meet even the filtering companies' own blocking criteria." J.S. App. 102a. That holding, which is based on extensive findings of fact that the government does not challenge, is correct.

A. CIPA Induces Unconstitutional Speech Restrictions on Internet Access in Public Libraries.

1. *CIPA's Restrictions Are Subject to Strict Scrutiny Because They Exclude Protected Speech From a Forum – Internet Access in a Public Library – That Is Dedicated to Free and Open Expression.*

Through CIPA, Congress has inflicted a profound double injury upon the First Amendment. Not only does CIPA unduly restrict the most diverse, expansive medium ever created, it also compounds the problem by regulating that medium in one of the most democratizing, speech-enhancing institutions in America – the public library. By targeting the intersection of these two First Amendment fora, CIPA ultimately weakens both, severely undermining the core constitutional values otherwise enhanced by the provision of Internet access in public libraries. CIPA's restrictions are subject to strict scrutiny because the law singles out for prohibition one type of speech in an otherwise unlimited forum for the exchange of ideas.[4]

a. As the district court recognized, strict scrutiny is especially warranted because CIPA regulates a forum that lies at the intersection of two institutions devoted to the promotion

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[4]The government acts as if appellees assert only the speech rights of Web publishers. *See* J.S. at 17. Certainly, CIPA infringes on those rights. But this case fundamentally involves the right of library patrons to receive information on the Internet. It is well settled that the First Amendment encompasses not only the right to speak but also the right to receive information. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 874 (1997) (invalidating statute because it "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another"); *Board of Education v. Pico*, 457 U.S. 853, 867-68 (1982) (plurality opinion) ("[T]he right to receive ideas follows ineluctably from the sender's First Amendment right to send them.").

of First Amendment values. *See id.* 10a, 128a-129a. First, the Internet is a unique, expansive medium for worldwide communication. "While 'surfing' the World Wide Web . . . individuals can access material about topics ranging from aardvarks to Zoroastrianism." *Ashcroft v. ACLU*, 122 S. Ct. 1700, 1703 (2002). The Internet presents low entry barriers, allowing almost anyone to communicate with a worldwide audience. J.S. App. 25a. Currently, at least 400 million people use the Internet worldwide, including over 143 million Americans. *Id.* As the Court recognized in *Reno v. ACLU*, 521 U.S. 844 (1997), expression on the Internet is "as diverse as human thought," *id.* at 870, and "is thus comparable, from the reader's viewpoint, to . . . a vast library including millions of readily available and indexed publications," *id.* at 853. Given the virtually boundless potential of expression on the Internet, "[t]his dynamic, multifaceted category of communication" is entitled to the highest level of First Amendment protection, without qualification. *Id.* at 870, 872.

Second, public libraries serve as a forum for the communication and receipt of information and the free exchange of ideas. Indeed, the public library, by its very nature, is "designed for freewheeling inquiry." *Board of Education v. Pico*, 457 U.S. 853, 915 (1982) (Rehnquist, J., dissenting). "As such, the library is a 'mighty resource in the free marketplace of ideas.'" J.S. App. 128a (quoting *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 582 (6th Cir. 1976)). As much as any institution, the public library has safeguarded the vital First Amendment right to receive speech and expression. In defining its purpose as information-provider, the public library historically has offered a wide and diverse range of expression to the public and has prohibited exclusion of materials based on disfavored content or viewpoints.

b. In providing Internet access to its patrons on free and equal terms, the public library furthers its speech-disseminating mission by opening its doors to a vast, boundless forum for expression. Having created such an unlimited forum, the government cannot exclude certain types of Web content without satisfying strict scrutiny. *See, e.g., International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (a designated public forum is "property that the State has opened for expressive activity by part or all of the public," and "[r]egulation of such property is subject to the same limitations as that governing a traditional public forum"); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983) (explaining that once a government has opened up a forum for expressive activity, it may not exclude certain types of content without satisfying strict scrutiny); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) (holding that town violated First Amendment when it refused to allow group seeking to perform the musical "Hair" access to a municipal public theater). As the district court put it, "Where the state provides access to a 'vast democratic forum[],' *Reno v. ACLU*, 521 U.S. 844, 868 (1997), open to any member of the public to speak on subjects as 'diverse as human thought,' *id.* at 870 (internal quotation marks and citation omitted), the state's decision selectively to exclude from the forum speech whose content the state disfavors is subject to strict scrutiny, as such exclusions risk distorting the marketplace of ideas that the state has facilitated." J.S. App. 10a.

The government argues that libraries can merely define the forum of Internet access to exclude one type of content – sexually explicit speech – without violating the Constitution. *See* J.S. at 17-18. That argument flies in the face of fundamental First Amendment principles, which make clear that once the government dedicates a forum to a general, speech-promoting use – in this case, the communication and

receipt of the broadest spectrum of information – it cannot limit that use by disfavoring certain expression. *See, e.g.*, *Perry*, 460 U.S. at 46.

CIPA's extensive, federally mandated incursion into the libraries' speech-enhancing function necessarily undercuts the institutions' primary purpose. CIPA's blocking mandate is particularly harmful in light of the crucial role libraries have played in making the extensive resources of the Internet available to the public. As the district court found, over 14 million people in the United States use the public library for Internet access, and of those, a disproportionate number are low-income. J.S. App. 36a-37a, 130a-131a n.26. "By providing Internet access to millions of Americans to whom such access would otherwise be unavailable, public libraries play a critical role in bridging the digital divide separating those with access to new information technologies from those that lack access." *Id.* 130a-131a n.26.

c. The government struggles to explain why, in its view, CIPA's selective exclusion of one type of speech from otherwise unfettered Internet access at the public library is not subject to any heightened scrutiny. In the district court, the government conceded that "the physical space of the library is itself a public forum," Defs.' Post-Trial Br. at 21, but argued that the library's provision of information via the Internet somehow *limits* the speech-enhancing nature of the library forum, *id.* at 18-26. In a notable reversal of strategy, the government now concedes that the *Internet* is a public forum subject to strict scrutiny, J.S. at 19, but claims that when a public library "brings Internet content into the library," *id.*, that somehow transforms the Internet into a nonpublic forum. The government's legal about-face merely serves to underscore the weakness in both versions of its argument that CIPA is immune from constitutional scrutiny.

Faced with the undeniably speech-enhancing nature of the Internet and the public library's indisputable status as a forum for freewheeling inquiry, the government has sought to cast CIPA's blocking mandate as somehow analogous to classic library collection development decisionmaking. That analogy fails for several reasons. As an initial matter, librarians have absolutely no involvement in the blocking decisions made by third-party blocking software companies. Those decisions are made by non-librarians who know nothing of a library's existing physical collections, the communities served by libraries, or the criteria used by librarians in selecting physical materials. In fact, because the software companies treat their blocking lists as proprietary and refuse to provide those lists to customers, J.S. App. 51a, libraries installing blocking software do not even know what Internet information they are withholding from the public. Moreover, in providing access to the Internet, libraries necessarily provide patrons with innumerable Web sites that they would never include in their physical collections. As a result, libraries that offer Internet access cannot be said to be exercising the type of editorial discretion they make when selecting materials for their print collection.[5]

The government's analogy fails for the additional reason that blocking Internet access involves an active, rather than passive exclusion of certain types of content. Because an Internet connection provides immediate access to the entire

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[5]To the extent classic collection development principles have any application in the Internet context, it is only through the selection of "recommended sites," which many libraries offer as a means of directing patrons to particularly useful or interesting Internet information. *Id.* 41a-42a. The government's suggestion that these lists of recommended sites resemble the traditional selection of physical materials in libraries is correct, but its argument that by recommending certain sites public libraries exercise editorial discretion over the entire Internet is illogical. *See* J.S. at 17-18.

Internet so "no appreciable expenditure of library time or resources is required to make a particular Internet publication available" and indeed "a library must actually expend resources to restrict Internet access to a publication that is otherwise immediately available," the blocking of Internet sites mandated by CIPA is akin to a library's purchasing an encyclopedia or a magazine and tearing out or redacting some of its content. *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, 2 F. Supp. 2d 783, 793-94 (E.D. Va. 1998). When a library declines to carry a book in hard copy as part of a necessarily selective acquisition process (given shelf space and resource constraints), it conveys no discernable message about the content of that book. When a Web site is blocked on the library's Internet terminals pursuant to a content-based policy, however, the library (through a software company) lets patrons know that it expressly disfavors the site's content.

In sum, a library providing broad Internet access opens a window to an enormous amount of information not otherwise available in the library's physical collection. When doing so, the library cannot, consistent with the First Amendment, selectively close that window to one type of disfavored content.

2. *CIPA's Requirement that Libraries Install Mandatory Blocking Software to Enforce a Content-Based Restriction on Speech Is Not Narrowly Tailored to Serve a Compelling Government Interest.*

As a content-based regulation on speech, CIPA is presumptively invalid. *See United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 817 (2000). The government bears the burden of demonstrating that the law

satisfies strict scrutiny. *Id.* at 816.[6] In this case, it was unable to satisfy that burden.

a. As the district court's factual findings make clear, CIPA will result in the suppression of a vast amount of Internet content and thus is far from narrowly tailored to serve the government's purported interests. The district court found that "[t]he commercially available filters on which evidence was presented at trial all block many thousands of Web pages that are clearly not harmful to minors, and many thousands more pages that, while possibly harmful to minors, are neither obscene nor child pornography." J.S. App. 148a-149a. This vast overblocking is due both to the design of blocking software – which is based on content categories far broader than CIPA's and is incapable of blocking visual images without also blocking text – and the significant flaws in the software that result from the inability of blocking software companies to keep up with the enormity of the Web and the inherent tradeoff between over- and underblocking. As the district court found, "any filter that blocks enough speech to protect against access to visual depictions that are obscene, child pornography, and harmful to minors, will necessarily overblock substantial amounts of speech that does not fall within these categories." *Id.* 151a. Not only does blocking software block far more speech than required by CIPA, it also fails to block a

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[6]The presumption against CIPA's content-based distinction is not changed because it targets sexually explicit speech. To the contrary, it is well settled that sexually explicit speech that does not fall within the narrow categories of unprotected expression is entitled to First Amendment protection. *See, e.g., Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1402 (2002) (confirming that speech that is neither obscene nor child pornography is protected by the First Amendment); *Reno*, 521 U.S. at 874-75 ("In evaluating the free speech rights of adults, we have made it perfectly clear that '[s]exual expression which is indecent but not obscene is protected by the First Amendment.'") (citation omitted).

substantial amount of images that CIPA prohibits. *See id.* 58a. CIPA is thus far from narrowly tailored.

The government simply has failed to justify CIPA's substantial infringement on protected speech. CIPA cannot be justified as a means to prevent inappropriate or criminal behavior in public libraries.[7] "The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1403 (2002); *see also id.* at 1399 ("The prospect of crime . . . by itself does not justify laws suppressing protected speech."). Nor is CIPA narrowly tailored to the government's purported interest in preventing patrons from directly or indirectly viewing images that are obscene, child pornography, or harmful to minors. As this Court has emphasized, "[t]he Government may not suppress lawful speech as the means to suppress unlawful speech." *Id.* at 1404; *see also, e.g.*, *United States v. Playboy Entm't Group*, 529 U.S. 803, 817-18 (2000). Likewise, prohibiting adults from viewing sexually explicit speech that is fully protected by the First Amendment cannot be justified because other patrons may find that speech offensive. *See Free Speech Coalition*, 122 S. Ct. at 1399 ("It is also well established that speech may not be prohibited because it concerns subjects offending our sensibilities.").[8] Even if that

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[7]As a factual matter, the district court noted that the government had failed to present evidence to support its claim that blocking software is necessary to prevent offensive behavior at the library, and observed that librarians testified that such behavioral problems "have long predated the advent of Internet access." *Id.* 146a.

[8]"[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather . . . the burden normally falls upon the viewer to 'avoid further bombardment of (his) sensibilities simply by averting (his) eyes.'" *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-11 (1975).

were a legitimate government interest, it would not justify CIPA's broad censorship of non-sexually explicit speech.

CIPA thus takes a meat ax approach to an area that requires far more sensitive tools. As a result, the law does not even approach the level of narrow tailoring required by the First Amendment. As this Court has explained, "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. Error in marking that line exacts an extraordinary cost." *Playboy*, 529 U.S. at 817-18 (internal quotation marks and citation omitted); *see also Keyishian v. Board of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963).

The government does not challenge the district court's finding that blocking software results in the wrongful blocking of a substantial amount of Web sites, but claims that this represents only a small portion of the Web, and that therefore "a patron will rarely need to obtain access to a site that has been blocked in order to obtain the information he or she seeks at the library." J.S. at 23-24. The government points to absolutely *no* evidence in the record for its assertion that the materials wrongly blocked by filters are otherwise available in books the library may own or elsewhere on the Web. Clearly, many Web sites contain unique expression. And it is no answer to the wrongful censorship of such expression to say that a patron may find similar speech elsewhere. *See, e.g.*, *Reno*, 521 U.S. at 880 ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.") (internal quotation marks and citation omitted); *Conrad*, 420 U.S. at 556 ("[I]t does not matter for purposes of this case that the board's

decision might not have had the effect of total suppression of the musical in the community.").

b. The Act's disabling provisions do not cure the overbroad reach of CIPA's restrictions; to the contrary, they *exacerbate* the statute's constitutional infirmities. As an initial matter, CIPA merely allows, but does not require, library authorities to disable Internet filtering software. *See* 20 U.S.C. § 9134(f)(3) and 47 U.S.C. § 254(h)(6)(D) (providing that authorities "*may* disable the technology protection measure") (emphasis added). Nothing prevents a library authority from denying a disabling request for any reason (or no reason at all), and there are no procedures for an appeal or review of the decision. Accordingly, the disabling provisions fall within the long-disfavored category of statutes that "vest[] unbridled discretion in a government official over whether to permit or deny expressive activity." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755 (1988).

Moreover,, the district court found as a fact that patrons would be unlikely to request unblocking of sites on sensitive topics because of the stigma attached to making such a request. J.S. App. 47a, 171a-73a. The disabling provisions thus impose a chilling effect on requesting library patrons that reinforces CIPA's constitutional failings. *See, e.g., Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 122 S. Ct. 2080, 2089 (2002) (holding that ordinance requiring speakers to surrender anonymity violates First Amendment); *Denver Area*, 518 U.S. at 754 (noting that "written notice" requirement for access to "patently offensive" cable channels "will further restrict viewing by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the 'patently offensive channel'"); *Lamont v. Postmaster General of the United States*, 381 U.S. 301, 307 (1965) (striking requirement that

recipients of Communist literature notify the Post Office that they wish to receive those materials).

Nor is there a practical way to process unblocking requests anonymously without substantially burdening patrons' right to receive information on the Internet. The district court found that most libraries that used blocking software did not offer a way to request unblocking anonymously, and the one that did took from 24 hours to one week to process the request. J.S. App. 46a, 174a. That delay is itself a substantial burden. *See Watchtower Bible*, 122 S. Ct. at 2090 (ordinance that effectively bans "a significant amount of spontaneous speech" violates the First Amendment).

c. Because CIPA's ban on speech is so wide, and includes a significant amount of Internet speech that is in no way related – much less tailored – to the images CIPA seeks to prohibit, the law fails strict scrutiny even without the existence of less restrictive alternatives. In any event, "[t]he breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as [CIPA]." *Reno*, 521 U.S. at 879. Not only has the government not met that burden, it essentially ignores the numerous alternative methods identified by appellees at trial for satisfying the government's purported interests. As the district court found, these alternatives include the *optional* use of blocking software; policies under which parents decide whether their children will use terminals with blocking software; the use of blocking software only for younger children (either restricted to children's areas or through age identification policies); enforcement of local Internet use policies; training in Internet usage; steering patrons to sites selected by librarians; installation of privacy screens or recessed monitors; and the segregation of unblocked computers or placing unblocked

computers in well-trafficked areas. *See* J.S. App. 41a-45a. In its jurisdictional statement, the government neglects even to address most of these alternatives, and as such fails to prove that they are sufficiently ineffective to justify Congress's decision to require mandatory blocking software everywhere. Based on the significant factual evidence found by the district court, moreover, blocking software itself is of only limited effectiveness at blocking images prohibited by CIPA. The serious questions about the general efficacy of blocking software, and the government's failure to show that the numerous alternatives do not work confirm the government's utter inability to carry its burden of demonstrating that CIPA is the only effective means for serving the government's interest (assuming that interest could ever justify such a broad suppression of speech).

B. CIPA Imposes an Unconstitutional Prior Restraint on Speech in Public Libraries.

CIPA also fails the *Dole* test because it induces public libraries to engage in unconstitutional prior restraints. Although the district court did not reach this issue in striking down the Act, *see* J.S. App. 179a, the prior restraint doctrine provides an alternate ground for affirmance.

CIPA imposes an unlawful prior restraint by silencing speech prior to its dissemination in public libraries, and prior to any judicial determination of the proper level of protection afforded that speech. The Act requires libraries to use technology that, as the district court found, erroneously blocks "countless thousands of Web pages," J.S. App. 91a, including "content that is completely innocuous for both adults and minors, and that no rational person could conclude matches the filtering companies' category definitions . . . ," *id.* 93a. CIPA thus induces libraries to restrain massive amounts of

constitutionally protected expression before any patron can receive it.

Moreover, by delegating the authority to restrict speech to third-party software companies who will not reveal what they are blocking, CIPA exacerbates the constitutional infirmities inherent in any prior restraint. The Court rejected a similar delegation of First Amendment decisionmaking authority in *Bantam Books*, which invalidated the "informal censorship" of a "Commission to Encourage Morality in Youth" created to evaluate potentially obscene or indecent materials. *Bantam Books*, 372 U.S. at 66-67, 71. In fact, CIPA extends the problem one step further, by conferring restrictive powers on private companies that refuse to disclose the results of their censorship decisions. Even if filtering companies attempted to conform their blocking decisions to CIPA's three categories – which they plainly do not, *see* J.S. App.51a – CIPA's blocking mandate would be constitutionally intolerable.

II. CIPA IMPOSES UNCONSTITUTIONAL CONDITIONS ON INTERNET FUNDING TO PUBLIC LIBRARIES.

While declining to rule on the plaintiffs' unconstitutional conditions claim, the district court discussed this issue at length in a footnote, suggesting that plaintiffs' claim likely has merit. *See* J.S. App. 180a-188a n.36. Because CIPA imposes unconstitutional conditions on the libraries' receipt of federal and private funds, this claim provides an independent basis for striking down the Act.

As an initial matter, the government focuses on the open question whether libraries, as public entities, have independent First Amendment rights. *See* J.S. at 27 n.6. But while appellees believe that public libraries may assert a First Amendment claim on their own behalf, this determination is unnecessary to the Court's resolution of plaintiffs' claims.

Libraries plainly have standing to assert their patrons' rights. *See, e.g., Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988). In addition, public libraries are best positioned to challenge the use of the federal government's spending power to conscript them into a massive distortion of private communication in an area specifically designed to "encourage a diversity of views." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001); *see also, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995).

Like the spending restrictions invalidated in *Velazquez, Rosenberger*, and *FCC v. League of Women Voters*, 468 U.S. 364 (1984), CIPA imposes unconstitutional restrictions on funding programs "designed to facilitate private speech." *Velazquez*, 531 U.S. at 542; *Rosenberger*, 515 U.S. at 833-34; *League of Women Voters*, 468 U.S. at 383, 392, 395. As noted above, the Internet enables "vast democratic forums," *Reno*, 521 U.S. at 868, creating an unprecedented, free-flowing marketplace of ideas funded, in part, by the two programs covered by CIPA. Through the Act's filtering mandate, "the Government seeks to use an existing medium of expression and control it . . . in ways which distort its usual functioning." *Velazquez*, 531 U.S. at 543.

CIPA's flaws also egregiously distort the usual functioning of public libraries and their ability to determine, on a local level, what information to provide to their communities. Just as the statute struck down in *Velazquez* constrained attorneys in making choices central to the performance of their professional duties, CIPA unduly restricts librarians in exercising basic professional judgments about how and to what extent information and ideas will be made available to the public. In *Velazquez*, the Court facially invalidated a funding condition that required recipients to make one particular

professional choice, the decision not to challenge existing welfare law. Similarly, CIPA unlawfully requires E-rate and LSTA recipients to make one particular professional choice: the decision to mandate blocking software for all patrons. As the Court recently explained, "Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us." *Playboy*, 529 U.S. at 818.[9]

In addition to the unconstitutional conditions described above, CIPA's restrictions unlawfully cover library Internet access not even subsidized by the federal funding programs. Under the statute, a public library participating in the E-rate or LSTA funding programs must certify that blocking software operates on "*any* of its computers with Internet access" during "*any use* of such computers," 20 U.S.C. §§ 9134(f)(1)(A), 9134(f)(1)(B) and 47 U.S.C. §§ 254(h)(6)(B), 254(h)(6)(C) (emphasis added). Thus, the law requires libraries to block speech even on computers and Internet connections wholly paid for with non-federal money. This is unconstitutional under *League of Women Voters*, in which the Court found fatal the fact that the statute did not permit public broadcasting stations "to segregate its activities according to the source of its funding" or "to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal

---

[9]In addition, because the E-rate and LSTA programs are designed to narrow the "digital divide," *see, e.g.*, J.S. App. 4a, 36a-37a, 130a, CIPA distorts the function of those programs by perpetuating gaps in Internet access among various groups. Under CIPA, those who rely on public libraries for Internet service will have substantially more restricted access to information than will people who have Internet access at home.

funds." 468 U.S. at 400; *see also Rust v. Sullivan*, 500 U.S. 173, 196-97 (1991).[10]

CONCLUSION

Although the judgment below was plainly correct, and would warrant summary affirmance, because this is a case involving important First Amendment principles, appellees do not oppose the government's request for plenary review.

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[10]The government suggests that libraries are "free to establish unfiltered computers at facilities or branches that do not receive assistance under the E-rate or LSTA programs." J.S. at 27 n.6. In the first place, the government's suggestion ignores the unequivocal language of the Act, which plainly requires a library to certify that it has installed filters on "*any* of its computers with Internet access." Nothing in the statutes or regulations governing the E-rate and LSTA programs suggests that smaller "facilities or branches" of public libraries are entitled to receive funding as separate entities independent of the public libraries of which they are a part. More generally, nothing in *League of Women Voters* prevented those who worked at the public broadcasting station from building entirely separate "facilities or branches" with non-federal money; the question was whether they could "use the *station's* facilities to editorialize with nonfederal funds," so long as steps were taken to ensure that the federal money was not used to subsidize the editorializing. 468 U.S. at 400 (emphasis added). Similarly, nothing about the law in *Velazquez* prevented the Legal Services lawyers from opening entirely separate private legal services centers across town from the ones that received federal money, yet that did not save the law.

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OCT 7 2002

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

UNITED STATES OF AMERICA, *et al.*,

Appellants,

—v.—

AMERICAN LIBRARY ASSOCIATION, INC., *et al.*,

Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT COURT OF PENNSYLVANIA

RESPONSE OF APPELLEES MULTNOMAH COUNTRY PUBLIC LIBRARY, *et al.*, TO APPELLANTS' JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the court below correctly held that CIPA (the Children's Internet Protection Act) violates the First Amendment by inducing public libraries to install Internet programs that block a vast amount of constitutionally protected speech?

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, respondents make the following statements:

1. The parent corporation of respondent PlanetOut Corporation, which has been dissolved and merged into Online Partners.com, Inc., is PlanetOut Partners, Inc.

2. More than 10% of PlanetOut Partners, Inc., shares issued and outstanding are owned by JP Morgan Partners and affiliated entities of JP Morgan Partners.

3. The following respondents do not have parent companies nor do any publicly held companies own 10% or more of their stock: Multnomah County Public Library; Connecticut Library Association; Maine Library Association; Santa Cruz Public Library Joint Powers Authority; South Central Library System; Westchester Library System; Wisconsin Library Association; Mark Brown; Sherron Dixon by her Father and Next Friend Gordon Dixon; James Geringer; Marnique Tynesha Overby by her Aunt and Next Friend Carolyn C. Williams; Emmalyn Rood by her Mother and Next Friend Joanna Rood; William J. Rosenbaum; Carolyn C. Williams; Quiana Williams by her Mother and Next Friend Sharon Bernard; Afraidtoask.Com; Alan Guttmacher Institute; Ethan Interactive, Inc. D/B/A Out In America; Naturist Action Committee; Wayne L. Parker; Planned Parenthood Federation Of America, Inc.; Planetout.Com; Jeffery Pollock; and Safersex.org.

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Pursuant to Rule 18.6 of the Rules of this Court, appellees Multnomah County Public Library, *et al.*, respectfully submit this response to the government's jurisdictional statement.

INTRODUCTION

The government asks this Court to consider and reverse the unanimous decision of a three-judge court striking down the Children's Internet Protection Act (CIPA), which imposes unprecedented speech restrictions on local libraries around the country that provide free Internet access to patrons. Based on extensive findings of fact from an eight-day trial, the lower court correctly held that CIPA induces public libraries to violate the First Amendment. The statute requires libraries to install blocking programs that inevitably block a substantial amount of protected speech for adults and minors. No blocking program offers content categories that are limited -- or indeed tied in any way -- to CIPA's legal definitions of obscenity, child pornography, or material that is "harmful to minors." There is no judicial involvement in the programs' decisions about which Web sites to block, and the programs' providers refuse to disclose their block lists to libraries. In contrast to the restrictive and ultimately ineffective blocking programs mandated by CIPA, libraries have devised a number of less restrictive ways to assist patrons who wish to avoid content they find offensive. For these reasons, CIPA fails the strict scrutiny required of content-based speech restrictions, and imposes an unlawful prior restraint. Because CIPA threatens to distort the democratic, speech-enhancing qualities of both public libraries and the Internet, the three-judge court correctly enjoined its enforcement.

The lower court judgment rests securely on this Court's holdings in prior cases, and appellees believe it should be summarily affirmed. Because this case involves an Act of Congress, and an area that the Court has repeatedly ad-

dressed, appellees recognize that the Court may grant plenary review regardless of the strength of the three-judge court's decision. In the event the Court prefers to engage in a more comprehensive examination, appellees provide the following overview of the case.

COUNTERSTATEMENT OF THE CASE

The Children's Internet Protection Act (CIPA) applies to every local library in the country that receives funds under two popular federal programs. J.S. App. 14a-16a.[1] CIPA requires libraries to install "technology protection measures" on all computers that provide Internet access, regardless of whether used by adults or minors, patrons or staff, or paid for by private or federal funds. 20 U.S.C. §9134(f)(1); 47 U.S.C. §254 (h)(6); J.S. App. 18a. The technology protection measure must operate "during any use of such computers." *Id.* It must prevent all adults and minors from accessing any "visual depictions" that are obscene or child pornography, and must also prevent minors from accessing images that are "harmful to minors." *Id.*

Two suits were filed in the United States District Court for the Eastern District of Pennsylvania challenging the constitutionality of the statute, and were consolidated. The plaintiffs in this case (hereinafter "Multnomah plaintiffs") include large urban libraries serving Portland, Oregon and Santa Cruz, California; library systems serving rural and suburban communities in south central Wisconsin and Westchester County, New York; and state library associations in Connecticut, Maine, and Wisconsin. The Multnomah plaintiffs also include seven individuals who use their local libraries for Internet access. For example, plaintiff Emmalyn Rood used the Internet at her library in her early teens to "research issues relating to her sexual identity." J.S. App. 22a. Finally, the Multnomah plaintiffs include eight web sites that were blocked by major blocking programs even though they provided no information that was illegal. Two of the web sites are for political candidates. AfraidtoAsk.com and Planned Parenthood provide medical information about sex. PlanetOut provides information of interest to gay and lesbian communities. *Id.* at 22a-24a.

Pursuant to the statute, a special three-judge court was convened. After a period of discovery, the court held an eight-day trial at which it heard the testimony of twenty witnesses and admitted hundreds of exhibits, including depositions. J.S. App. 6a. On May 31, 2002, before the statute would have required libraries to install blocking programs, the three-judge court unanimously concluded that the statute was unconstitutional and enjoined its application. The court made "extensive findings of fact," *id.* at 7a, that consume almost one hundred pages in the Appendix to the Jurisdictional Statement. The government does not argue that any of these facts are clearly erroneous.[2]

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[1] CIPA modified three federal funding statutes: the Library Services and Technology Grants ProGram, 20 U.S.C. §9101 *et seq.*; the FCC-administered "e-rate" program, 47 U.S.C. §254(h); and the Elementary and Secondary Education Act, 20 U.S.C. §6801 *et seq*. This case is a challenge solely to the first two statutes and solely to the application of CIPA to public libraries. CIPA's provisions concerning schools are not at issue in this case.

[2] The government largely ignores the court's factual findings, citing instead contrary facts in congressional reports or portions of transcript testimony. The government also ignores two congressionally commissioned reports whose findings largely confirm those of the three-judge court. J.S. App. 94a, n.19; National Research Council, "Youth, Pornography, and the Internet," May, 2002; COPA Commission, "Final Report of the COPA Commission," October 20, 2000.

A. The Three-Judge Court's Findings Of Fact

1. Public Libraries and Internet Access

The three-judge court made a number of findings about the mission of public libraries and their provision of Internet access to the public. Libraries share a common mission to provide patrons with a wide range of information and ideas. J.S. App. 33a, 187a, n.36. They do so in part by applying professional standards to select books, tapes, and other materials for their collections, including materials that contain sexually explicit text and images. *Id.* at 33a, 34a.

Librarians also routinely provide patrons with access to materials not in their collections "through the use of bibliographic access tools and interlibrary loan programs." J.S. App. 34a. Through these programs, libraries provide materials that they have neither the space nor the funds to carry directly. Librarians do not apply selection criteria when using these methods; instead, they provide the patron with any resource they can obtain. *See* Cooper test. 3/25/02 at 94. Librarians are trained to use just about any means to assist a patron in obtaining information he or she seeks. J.S. App. 33a-34a. Increasingly, they turn to the Internet.

"The Internet vastly expands the amount of information available to patrons of public libraries." J.S. App. 36a. Approximately 95% of all public libraries now provide Internet access. *Id.* There is an enormous demand for the service. *Id.* "Public libraries play an important role in providing Internet access to citizens who would not otherwise possess it." *Id.* For many in lower income brackets, the library is their only source of access to the Internet. *Id.* at 36a-37a, 130a.

The court found that the provision of Internet access at public libraries is notably different than the selection of

materials for physical collections. J.S. App. 120a-127a. Through the Internet, librarians provide access to a vast range of Internet content regardless of its merit. J.S. App. 124a. They invite "patrons to access speech whose content has never been reviewed and recommended as particularly valuable by either a librarian or a third party to whom the library has delegated collection development decisions." *Id.* at 123a. Indeed, any "member of the public with Internet access could . . . tonight jot down a few musings on any subject under the sun and tomorrow those musings would become part of public libraries' online offerings and be available to any library patron who seeks them out." *Id.* at 124a-25a.

2. Internet Blocking Programs

Because Internet blocking programs are the only "technology protection measures" currently available for libraries to comply with CIPA, the three-judge court made extensive findings about their operation and efficacy. Internet blocking programs, or filters, are software products created and sold by private companies. These products categorize and then block speech on the Internet. For example, one well-known product, Websense, has created 30 categories ranging from "Abortion Advocacy" to "Job Search" to "Tasteless" and "Adult." J.S. App. 50-51a. "[N]o category definition used by filtering software companies is identical to CIPA's definitions . . . [and] there is no judicial involvement in the creation of the filtering software companies' category definitions." *Id.* at 51a.

The products search the Internet looking for web sites or pages they believe may fit into their categories. If they find a site and conclude that it does match their category, they place it into that category. If a library using the product chooses that blocking category, then any attempt to access a site in that category will be blocked. J.S. App.

52a. The sites placed in each category "are considered to be proprietary information, and hence are unavailable to customers or the general public for review, so that public libraries that select categories when implementing filtering software do not really know what they are blocking." *Id.* at 7a.

Although the statute only requires blocking of "visual depictions," none of the available products categorizes sites based solely on visual depictions and none blocks visual depictions without also blocking text. J.S. App. 56a, 93a. Neither judges nor professional librarians are involved in the products' decision to categorize and block particular web sites. *Id.* at 51a, 53a. "[F]iltering companies generally do not re-review the contents of that page or site unless they receive a request to do so, even though content on individual Web pages and sites changes constantly." *Id.* at 53a.

All of the parties agreed, and the court found, that all of the available products overblock, *i.e.*, they block sites that do not fit either the category definitions established by the companies or the differently (and more narrowly) defined statutory categories. J.S. App. 7a, 8a, 11a, 12a, 48a-94a.[3] Relying on expert testimony from both parties, the court found that "commercially available filtering programs erroneously block a huge amount of speech that is protected by the First Amendment." *Id.* at 91a. The court estimated the number of web pages blocked to be "at least tens of thousands." *Id.* at 93a.

Specifically, the court found that even defendants' expert identified "substantial" rates of overblocking and that his rates "greatly understate the actual rates of overblocking that occurs." J.S. App. 79a. That expert admitted that

[3] Similarly, underblocking is the failure to block sites that fit either the categories established by the products or the different categories established by the statute. J.S. App. 65a-67a.

library patrons across the country would be wrongly denied access to web content millions of times each year, even using his rate of overblocking. Finnell test, 4/1/01 at 175-59. In addition, plaintiffs' expert Benjamin Edelman testified about his study of overblocking, and submitted a CD-ROM that contained screen shots of over 4,000 documented examples. J.S. App. 79a-86a. Because Edelman's study also necessarily underestimates the amount of overblocking, the court found that "many times the number of pages that Edelman identified are erroneously blocked by one or more of the filtering programs." *Id.* at 85a-86a.

From evidence presented by both parties, the three-judge court gave dozens of examples of wrongly blocked sites ranging from religion sites (*e.g.*, Orphanage Emmanuel, a Christian orphanage in Honduras blocked by CyberPatrol as Adult/Sexually Explicit and the homepage of a Buddhist nun categorized as nudity by N2H2), to government sites (*e.g.*, a Danish anti-death penalty site categorized by N2H2 as pornography and a list of government web sites in Adams County, Pennsylvania categorized by Websense as sex), to sports sites (*e.g.*, the Sydney University Australian Football Club categorized by Smartfilter as Sex). J.S. App. 86-89a.

The court also concluded that all blocking programs *inevitably* overblock and underblock, and made lengthy findings in support of this conclusion. J.S. App. 48a-94a; 150a-51a. There is no "technology protection measure" that will do what the law requires without also blocking access to a vast amount of speech that is constitutionally protected for both adults and minors. *Id.* at 7a, 12a, 13a, 48a-94a. Relying in part on the expert testimony of Geoffrey Nunberg, the court found that "these failures spring from constraints on the technology of automated classification systems, and the limitations inherent in human review, including error, misjudgment, and scarce resources." *Id.* at 7a. "[I]t is currently impossible given the Internet's size,

rate of growth, rate of change, and architecture, and given the state of the art of automated classification systems, to develop a filter that neither underblocks nor overblocks a substantial amount of speech." *Id.* at 68a; 54a.

Specifically, the court found that "2 billion is a reasonable estimate of the number of Web pages that can be reached, in theory, by standard search engines" J.S. App. 30a, and that it is growing at a rate of 1.5 million pages per day. *Id.* The court also found that perhaps "two to ten times" the number of web pages accessible to search engines are accessible through other means such as identification in email. *Id.* and 29a. "Web pages and sites are constantly being removed, or changing their content . . . Individual web pages have an average life span of approximately 90 days." *Id.* Obviously, no company can review all of this content. *See, e.g., id.* at 60a. These constraints lead blocking companies to cut corners when categorizing web sites, inevitably causing substantial overblocking and underblocking. *Id.* at 48a-94a.

The court also made findings about the feasibility of unblocking sites wrongly blocked by the programs, and the effect of requiring patrons to seek permission to access blocked sites. CIPA allows, but does not require, libraries to unblock sites upon the request of an adult patron with a "bona fide research or other lawful purpose." 20 U.S.C. §9134 (f)(3); 47 U.S.C. §254(h)(6)(D).[4] All of the available products offer a method for doing some unblocking. J.S. App. 46a. In Tacoma, Washington, in which a librarian not only handles unblocking requests but searches on his own for errors, defendants' expert found there was still substantial overblocking. J.S. App. 46a, 72a. Even when sites were unblocked, the process took "between 24 hours and a

[4] Under the primary funding scheme, minors cannot request unblocking; under the other scheme, they can. J.S. App. 168a, n.33.

week." *Id.* at 46a. "None of these libraries [proffered by the government] makes differential unblocking decisions based on the patrons' age. Unblocking decisions are usually made identically for adults and minors. Unblocking decisions even for adults are usually based on suitability of the Web site for minors." *Id.* at 47a. The government failed to prove that any product was capable of unblocking for adults but not minors, for one patron only (as opposed to all patrons), or for only a specified time period based on a particular patron's need. Edelman test, 4/2/02 at 64-67.

Even assuming that unblocking according to the statute is feasible, the court found that "many patrons are reluctant or unwilling to ask librarians to unblock Web pages or sites that contain only materials that might be deemed personal or embarrassing, even if they are not sexually explicit or pornographic." J.S. App. 47a, 172a-173a. For example, plaintiff Emmalyn Rood testified "that she would have been unwilling as a young teen to ask a librarian to disable filtering software so that she could view materials concerning gay and lesbian issues." J.S. App. 47a. The court found that "[t]he pattern of patron requests to unblock specific URLs in the various libraries involved in this case" also confirmed that "patrons are largely unwilling to make unblocking requests unless they are permitted to do so anonymously." *Id.* For example, defendants' expert testified that the Greenville Public Library in South Carolina wrongly blocked close to a hundred sites in a two-week period (a serious underestimate of actual overblocking, as the court found), but the library has received only 28 unblocking requests in almost two years. *Id.* at 47a, 73a.1.4

3. Alternative Methods For Avoiding Unwanted Internet Content At Libraries

Prior to the hammerlock imposed by CIPA, more than 90% of public libraries had exercised their local discretion

not to require the use of blocking programs, in part because of its deficiencies. J.S. App. 3a, 45a. Many also view the requirement that they censor speech as fundamentally inconsistent with the mission of libraries. Instead, as the three-judge court found, libraries have developed a variety of methods for assisting patrons in finding the content they want and avoiding unwanted content, including sexual material. *Id.* at 41a-48a. These methods include the optional use of blocking programs, training in Internet searches, and lists of recommended sites. *Id.* at 41a, 45a. For patrons (or staff) that are concerned about walking by a computer terminal when another patron is viewing material considered offensive, libraries offer devices such as privacy screens, or configure their computers to minimize that possibility. *Id.* at 43a-44a. Virtually all libraries have "acceptable use" policies that govern patron use of the computers. *Id.* at 37a. Finally, librarians can and do, of course, call law enforcement when appropriate. *Id.* at 159a.

B. The Three-Judge Court's Legal Analysis

In its legal analysis, the three-judge court held that CIPA was unconstitutional because it induces libraries "to engage in activities that would themselves be unconstitutional." J.S. App. 97a. The court analogized to the public forum doctrine, finding that "[a]lthough a public library's provision of Internet access does not resemble the conventional notion of a forum as a well-defined physical space, the same First Amendment standards apply." *Id.* at 108 (citing *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995)). More specifically, the court found that strict scrutiny applies because blocking programs single out disfavored speech for exclusion based on content in a forum otherwise designated for unrestricted expressive activity on a wide range of topics. J.S. App. 118a.

Although the court found that the state would have a compelling interest in preventing access to illegal speech, the government had to prove that CIPA's blocking mandate "is narrowly tailored to further those interests, and that no less restrictive means of promoting those interests exists." J.S. App. 148a. "Given the substantial amount of constitutionally protected speech blocked by filters studied," the court concluded that CIPA was "not narrowly tailored." *Id.* at 149. The court also held that "there are plausible, less restrictive alternatives to the use of software filters that would serve the government's interest." *Id.* at 158. Finally, the court concluded that the disabling provisions of CIPA did not cure its unconstitutionality. "[T]he content-based burden that the library's use of software filters places on patrons' access to speech suffers from the same constitutional deficiencies as a complete ban on patrons' access to speech that was erroneously blocked by filters, since patrons will often be deterred from asking the library to unblock a site and patron requests cannot be immediately reviewed." *Id.* at 176a.

ARGUMENT

I. The Three-Judge Court's Injunction Should Be Affirmed Because CIPA Induces Public Libraries To Violate The First Amendment

As the three-judge court recognized, "[t]he legal context in which this extensive factual record is set is complex," and "[t]here are a number of potential entry points into the analysis." J.S. App. 9a. Put most simply, even the government concedes that Congress may not use its spending authority "to induce the States to engage in activities that would themselves be unconstitutional." *South Dakota v. Dole*, 483 U.S. 203, 210 (1987). Regardless of which form the legal analysis takes from there, CIPA's scheme clearly violates that standard.

A. CIPA's Content-Based Restriction On Speech Fails Strict Scrutiny

By its terms and effect, CIPA imposes a content-based restriction on speech. Because of the nature of Internet access in public libraries, the three-judge court correctly held that CIPA is subject to strict scrutiny. J.S. App. 138a. The three-judge court aptly compared Internet access at public libraries to traditional public fora like sidewalks and parks that "promote First Amendment values." *Id.* at 129a. The court also drew certain principles from this Court's unconstitutional conditions cases,[5] and noted that "the more narrow the range of speech that the government chooses to subsidize (whether directly, through government grants or other funding, or indirectly, through the creation of a public forum) the more deference the First Amendment accords the government in drawing content-based distinctions." *Id.* at 112a. Conversely, "where the state designates a forum for expressive activity and opens the forum for speech by the public at large on a wide range of topics, strict scrutiny applies to restrictions that single out for exclusion from the forum particular speech whose content is disfavored." *Id.* at 118a.

Applying these principles to this case, the court

[5] Although the three-judge court did not rule on plaintiffs' unconstitutional conditions claim, it included a lengthy footnote analyzing the relevant cases. Noting that "the First Amendment is not phrased in terms of who holds the right, but rather what is protected," J.S. App. at 183a n.36, the court opined that plaintiffs may have a valid unconstitutional conditions claim based on the First Amendment rights of either public libraries or their patrons. *Id.* at 188a n.36. The Court also noted that "[b]y interfering with public libraries' discretion to make available to patrons as wide a range of constitutionally protected speech as possible, the federal government is arguably distorting the usual functioning of public libraries as places of freewheeling inquiry." *Id.* at 187a n.36 (citing *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001).

properly placed public library Internet access at the most speech-protective end of the scale. "The unique speech-enhancing character of Internet use in public libraries derives from the openness of the public library to any member of the public seeking to receive information, and the openness of the Internet to any member of the public who wishes to speak." *Id.* at 135a-136a. When public libraries provide Internet access, they "create[] a forum for the facilitation of speech, almost none of which either the library's collection development staff or even the filtering companies have ever reviewed." *Id.* at 125a. By forcing libraries to use blocking programs, CIPA "risk[s] fundamentally distorting the unique marketplace of ideas that public libraries create when they open their collections, via the Internet, to the speech of millions of individuals around the world on a virtually limitless number of subjects." *Id.* at 126a.

Because CIPA is properly subject to strict scrutiny, it is presumptively invalid, and must be struck down unless the government can prove it is narrowly tailored to serve a compelling government interest. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989)); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 879 (1997). As the three-judge court's detailed findings clearly establish, CIPA suppresses a vast amount of Internet content and is far from narrowly tailored to serve the government's interest in prohibiting access to illegal images. Blocking programs "block many thousands of Web pages that are clearly not harmful to minors, and many thousands more pages that, while possibly harmful to minors, are neither obscene nor child pornography." J.S. App. 148a-149a. This evidence "significantly underestimate[s] the amount of speech that filters erroneously block." *Id.* at 149a. As the defendants' own expert conceded, the programs block content that does not

even meet "the filtering products' own definitions of sexually explicit content, let alone the legal definitions of obscenity or child pornography." *Id.* Indeed, given the fundamental flaws of blocking programs, the court found that any public library's use of blocking programs will fail to be narrowly tailored. "[A]ny technology protection measure that blocks a sufficient amount of speech to comply with CIPA . . . will necessarily block substantial amounts of speech that does not fall within these categories." *Id.* at 151a.

Government-mandated blocking programs are blunt instruments in an area that requires far more sensitive tools. "The First Amendment requires the precision of a scalpel, not a sledgehammer." J.S. App. 156a. As this Court has explained, "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. Error in marking that line exacts an extraordinary cost." *Playboy*, 529 U.S. at 817-18 (internal quotation marks and citation omitted).

Especially given the breadth of CIPA's impact on protected speech, the government clearly failed to meet its "heavy burden . . . to explain why a less restrictive provision would not be as effective as [CIPA]." *Reno*, 521 U.S. at 879. As the three-judge court found, a number of alternative methods further the government's stated interests in a manner far less burdensome on protected speech than the mandatory use of blocking programs for all adults and all minors regardless of age. J.S. App. 157a-167a. These alternatives -- currently used by the vast majority of public libraries nationwide -- include the *optional* use of blocking software; policies under which parents decide whether their children will use terminals with blocking software; the use of blocking software only for younger children; enforcement of local Internet use policies; training in Internet usage; steering patrons to sites selected by librarians; installation of

privacy screens or recessed monitors; and the segregation of unblocked computers or placing unblocked computers in well-trafficked areas. *Id.*

Rather than grapple with the overwhelming evidence against them, the government argues that the First Amendment is practically irrelevant to this case because CIPA is akin to a library's traditional collection decisions. Govt. J.S. at 16-20. This analysis is flawed in numerous ways. First, CIPA federally *mandates* blocking for all libraries and all users, and is thus a far cry from a library's exercise of its own editorial judgment. Second, the specific findings of the three-judge court refute the governments' proposed analogy between Internet access and book selection decisions. When public libraries provide patrons with Internet access, they allow any member of the public to receive speech "from anyone around the world who wishes to disseminate information over the Internet." J.S. App. 137a-138a. Unlike decisions to include books in their print collections, when offering Internet access librarians do not exercise editorial discretion and select only pre-approved speech for inclusion. Even libraries that filter Internet access have no control over the vast amount of unfiltered content still made available, and have no clue what web sites the program blocks. *Id.* at 7a; 125a. Third, the government argues that the three-judge court's approach must be wrong because it "would risk transforming the role of public libraries in our society." In fact, it is CIPA that risks changing librarians from information providers into censors. CIPA forces libraries to install filters that, out of the "vast democratic forum" of the Internet, "single out for exclusion particular speech on the basis of its disfavored content." *Id.* at 138a. Such a mandate, under all of the relevant law, is clearly subject to and fails strict scrutiny.[6]

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[6] CIPA would clearly fail constitutional scrutiny even under rational (continued...)

B. The Disabling Provisions Fail To Cure CIPA's Defects

The three-judge court rightly held that CIPA's disabling provisions do not cure its constitutional defects. J.S. App. 167a-177a. Even assuming the broadest possible interpretation of those provisions, "the "requirement that library patrons ask a state actor's permission to access disfavored content violates the First Amendment." *Id.* at 170a. This Court has struck down numerous content-based restrictions that require recipients to identify themselves before being granted the right to access or communicate disfavored speech. *See, e.g., Lamont v. Postmaster General*, 381 U.S. 301 (1965)(invalidating federal statute requiring postmaster to halt delivery of communist propaganda absent affirmative request); *Denver Area Educ. Telecom. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996)(striking down federal law requiring cable users to request sexually explicit programming in writing); *Playboy, Inc.*, 529 U.S. 803 (invalidating law requiring cable users to request access to scrambled sexually explicit programming). As this Court explained just last term, "It is offensive -- not only to the values protected by the First Amendment, but to the very notion of a free society -- that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so." *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, ___ U.S. ___, 122 S.Ct. 2080, 2089 (2002)(striking down local ordinance that prohibited door-to-door canvassers from "promoting any cause" without first

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[6] (...continued)
basis review. There may be no better example of irrationality than mandated government use of a product that secretly categorizes and blocks a huge amount of speech that comes nowhere close to the type of content the law was intended to restrict.

obtaining a permit). It is equally offensive that a citizen must obtain government approval before accessing protected speech on the Internet in her public library.

As the three-judge court noted, the deterrent effect of the disabling provisions is "a matter of common sense as well as amply borne out by the trial record." J.S. App. 172a. For example, plaintiff Emma Rood testified that as a gay teen she would have been unwilling to ask a librarian to disable blocking programs so that she could research issues related to her sexual identity. *Id.* Plaintiff Mark Brown would have been equally embarrassed to ask a librarian to unblock sites when he was researching his mother's breast cancer. *Id.* Significantly, the three-judge court found that the reluctance of patrons to request unblocking is also established "by the low number of patron unblocking requests, relative to the number of erroneously blocked Web sites, in those public libraries that use software filters and permit patrons to request access to incorrectly blocked Web sites." *Id.* at 173a. Given the content-based burden the disabling provision imposes on protected speech, and its strong deterrent effect, the provision "fail[s] to cure CIPA's lack of narrow tailoring." *Id.* at 177a; *see also Playboy*, 529 U.S. at 812 ("It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree").

C. CIPA Imposes A Prior Restraint On Speech

CIPA's blocking mandate also imposes an unlawful prior restraint by effectively silencing speech prior to its dissemination in public libraries, without judicial determination or even the semblance of First Amendment due process. The only other court to consider the constitutionality of mandatory Internet blocking at a public library invalidated the practice for this reason. *See Mainstream Loudoun v. Board of Trustees of Loudoun County*, 24

F.Supp.2d 552, 570 (E.D.Va. 1998)(because mandatory blocking policy "has neither adequate standards nor adequate procedural safeguards," it is an unconstitutional prior restraint). By mandating the use of blocking programs that block speech that is not even close to the line between protected and unprotected speech, CIPA imposes a classic system of prior restraint which presumptively violates the Constitution. *See Near v. Minnesota*, 283 U.S. 697, 713 (1931)("the chief purpose of the [First Amendment] is to prevent previous restraints upon publication"). Blocking programs function literally as automated censors, blocking speech in advance of any judicial determination that it is unprotected. They arbitrarily and irrationally block thousands of web pages that are fully protected. In this Court's words, "[t]his is . . . the essence of censorship." *Id.* at 713.

A postmaster who opened all letters and refused to deliver letters with the word "sex" in them would clearly be violating the First Amendment's rule against prior restraints. *See Blount v. Rizzi*, 400 U.S. 410 (1971)(striking down statute that allowed Postmaster General to halt use of mail for commerce in allegedly obscene materials). As the Court has explained, "[t]he United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues." *Id.* at 416 (citations omitted). Similarly, having chosen to fund Internet access, the government "may not thereafter selectively restrict certain categories of Internet speech because it disfavors their content." *See Mainstream Loudoun v. Board of Trustees of Loudoun County*, 2 F.Supp.2d 783, 795-96 (E.D.Va. 1998).

"[A]ny system of prior restraints of expression comes to [the court] bearing a heavy presumption against its constitutional validity." *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963)(morality commission, whose purpose was to

recommend prosecution of obscenity, imposed unconstitutional prior restraint by sending notices to booksellers that certain books were objectionable); *see also Southeastern Promotions v. Conrad*, 420 U.S. 546, 559 (1975)(municipal board's denial of permission for performance of the rock musical "Hair" at a city auditorium, because of reports that the musical was "obscene," was an unconstitutional prior restraint); *Drive In Theatres, Inc. v. Huskey*, 435 F.2d 228, 230 (4th Cir. 1970)(invalidating as "unconstitutional prior administrative restraint" a sheriff's practice of seizing and terminating exhibition of R-rated movies).

By delegating the authority to restrict speech to third-party, non-governmental actors who will not reveal what they are censoring, moreover, CIPA confounds the constitutional infirmities inherent in any prior restraint. There is no question that the decisions of blocking programs "to list particular publications as objectionable do not follow judicial determinations that such publications may lawfully be banned." *Bantam Books*, 372 U.S. at 70. CIPA's disabling provisions inflict further First Amendment injury by vesting librarians with unbridled discretion to undo selectively the blocking companies' censorship decisions. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992)("The First Amendment prohibits the vesting of such unbridled discretion in a government official"); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969)("a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license" is unconstitutional absent "narrow, objective, and definite standards to guide the licensing authority"). CIPA's censorship system comes nowhere close to the judicial review that is required when First Amendment rights are at stake. *Freedman v. Maryland*, 380 U.S. 51 (1965).

CONCLUSION

For the reasons stated above, the judgment below was plainly correct and warrants summary affirmance. However, because the case presents First Amendment issues of national importance, appellees do not oppose the government's request for plenary review.

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In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

AMERICAN LIBRARY ASSOCIATION, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR APPELLANTS

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In the Supreme Court of the United States

No. 02-361

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

AMERICAN LIBRARY ASSOCIATION, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR APPELLANTS

The United States seeks plenary review of the three-judge district court's holding that the application of the Children's Internet Protection Act (CIPA) to public libraries is unconstitutional on its face under the First Amendment. CIPA specifies that decisions holding the challenged provisions unconstitutional "shall be reviewable as a matter of right by direct appeal" to this Court. Act of Dec. 21, 2000, Pub. L. No. 106-554, App. D, § 1741(b), 114 Stat. 2763A-352. Appellees defend the district court's decision, and the American Library Association appellees have filed a document styled motion to affirm. In the end however, appellees do not oppose plenary review in light of the important First Amendment issues raised. ALA Mot. to Aff. 26; Multnomah County Resp. 20.

Appellees' defense of the district court's holding is in any event unpersuasive. A public library's use of filtering software to prevent access to material that is obscene, child pornography, or harmful to minors falls within a public library's traditional authority to determine what material it will provide to its patrons. Especially in light of that traditional discretion, a public library's use of filtering software to restrict access to pornographic material does not violate the

First Amendment. The district court therefore erred in holding CIPA facially unconstitutional on the ground that its requirement that a library receiving federal assistance for Internet access must utilize filtering software to restrict access to pornographic material induces public libraries to violate the First Amendment. At the very least, the government's appeal of the district court's ruling condemning the use of filtering software raises a substantial First Amendment issue. For that reason, and because appellees do not oppose the government's request for plenary review, the Court should note probable jurisdiction of the government's appeal and set the case for plenary review.

A. A Public Library's Use Of Filtering Software Does Not Trigger Strict Scrutiny

1. Appellees contend that strict scrutiny applies to a public library's use of filtering software to prevent access to material that is covered by CIPA because a public library is analogous to a traditional public forum, such as a public street or park. ALA Mot. to Aff. 12; Multnomah County Resp. 12. That analogy is fundamentally misconceived. By history and tradition, the government plays no role in determining the content of expression in public streets and parks. See *Hague* v. *Committee for Indus. Org.*, 307 U.S. 496, 515 (1939). In contrast, by history and tradition, libraries—including public libraries—have always determined which material they will offer to their patrons. See J.S. 15. Thus, while content-based restrictions on expression in a traditional public forum are subject to strict scrutiny, a public library's content-based judgments regarding the material it will provide to its patrons are not.

If public libraries were equivalent to traditional public fora, as appellees suggest, a public library's content-based judgments regarding the books, magazines, and videos that it collects would also be subject to strict scrutiny. Such an approach would radically transform the traditional role of

public libraries, effectively removing from public libraries primary authority to decide what material to collect as a matter of discretion and transferring that authority to the courts as a matter of constitutional law.

Unwilling to defend the application of strict scrutiny to a library's traditional collection practices, appellees struggle to distinguish a library's use of filtering software on its own computers from other collection practices. For example, ALA contends (Mot. to Aff. 15) that the use of filtering software does not involve editorial judgment because the filtering companies create the filtering categories and determine the material that falls within each category. But public libraries exercise their own independent judgment in selecting the filtering software and categories that they will use, and public libraries have the capacity to unblock any material that has been erroneously blocked. See J.S. 18, 23. In addition, CIPA permits a library to disable the filtering software to allow patrons to gain access to blocked material for lawful purposes. See J.S. 23. Public libraries that accept federal assistance and use filtering software may therefore exercise the same kind of judgments that they exercise when they collect books, magazines, and videos.

ALA also asserts (Mot. to Aff. 15-16) that traditional content-based collection practices are passive and do not convey a message about the content of a book a library declines to purchase, while the use of screening software is active and has the effect of conveying the message that the library disfavors a website's content. But there is nothing passive about a library's decision not to collect pornographic magazines or xxx videos for its own patrons, and the public can readily discern that the absence of such material reflects a deliberate library policy that such materials are inappropriate for its collection even if that policy is not publicly announced. In any event, no decision of this Court suggests that the government may avoid strict scrutiny where it

would otherwise apply simply by keeping the basis for its decisions hidden from the public. ALA's attempted distinctions between the use of filtering software and other collection practices therefore do not withstand analysis.

Multnomah County argues (Resp. 15) that a public library's traditional collection practices are distinguishable from a library's use of filtering software because CIPA *mandates* filtering software for all public libraries and all users. CIPA does not impose any such mandate. CIPA applies only to those public libraries that voluntarily agree to use filtering software as a condition of receiving Internet-related federal assistance. Those voluntary decisions by public libraries in assembling their collections are entitled to just as much deference as other collection practices. CIPA's effect is the same as if a wealthy private donor contributed funds to a library to build its collection on the condition that it not use the funds to purchase pornographic materials. The First Amendment allows the library to honor conditions set by public as well as private donors.

2. Appellees' other grounds for urging application of strict scrutiny are equally unpersuasive. ALA argues (Mot. to Aff. 11-12) that strict scrutiny is applicable because the Internet is a unique medium for worldwide communication. A public library's use of filtering software, however, does not regulate the content of communication on the Internet or affect its dissemination throughout the world. Instead, the use of filtering software affects only the content that a public library provides to its patrons through its own computers. Appellees' focus on the nature of the Internet ignores that fundamental distinction between the government as a regulator of speech by private persons left to their own devices, and the government as a collector and provider of information using its own facilities.

A library's traditional collection practices illustrate that distinction. Like communication on the Internet, communication through books, magazines, and videos is entitled to the highest degree of constitutional protection. Thus, the government may not prevent the authors of books, magazines, or videos from distributing their works to willing recipients without satisfying strict scrutiny. But that does not mean that either the authors or individuals who may want to read their books may insist that a public library make the authors' works a part of the library's collection. The same is true of the Internet. If the work is not outside the protection of the First Amendment, and absent an overriding government interest, authors have a constitutional right to place their works on the Internet, and private individuals have a constitutional right to view them. But neither has a right to insist that a public library make those works available through its Internet-connected computers.

Finally, Multnomah County argues (Resp. 12) that strict scrutiny is warranted based on this Court's government funding cases. However, those cases establish that government has broad discretion to make content-based decisions regarding what expression to fund. See *NEA* v. *Finley*, 524 U.S. 569, 585-588 (1998); *Arkansas Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 672-675 (1998); *Rust* v. *Sullivan*, 500 U.S. 173, 193-194 (1991). They do not suggest that content-based funding decisions are subject to strict scrutiny.

Legal Services Corp. v. *Velazquez*, 531 U.S. 533 (2001), cited by Multnomah County (Resp. 12 n.5), does not hold that content-based funding decisions are subject to strict scrutiny. In that case, the Court applied strict scrutiny because the government refrained from funding certain speech based on the anti-government viewpoint of the speaker, and that funding decision interfered with the proper functioning of the Judicial Branch of government. Neither of those unique factors is present here.

B. The Use Of Filtering Software Constitutionally Advances The Government's Interest In Preventing Access To Material That Is Obscene, Child Pornography, Or Harmful To Minors

Appellees argue that the use of filtering software is not "narrowly tailored" to serve the government's interests. ALA Mot. to Aff. 16-22; Multnomah County Resp. 13-15. Because a library's traditional collection practices are not subject to strict scrutiny, a library's use of filtering software need not satisfy strict scrutiny's narrow tailoring requirement. Regardless of the standard of review, however, the use of filtering software is a permissible method to further the government's compelling interest in preventing access to material that is obscene, child pornography, or harmful to minors. It follows that Congress may prevent federal assistance from being used in a manner that would facilitate that access.

1. Appellees' principal constitutional objection to filtering software is that it erroneously blocks what in their view is a significant amount of constitutionally protected material. ALA Mot. to Aff. 17; Multnomah County Resp. 14-15. A public library, however, does not have an obligation to add material to its collection simply because the material is constitutionally protected. Public libraries regularly decline to include hundreds of thousands of constitutionally protected books, magazines, and videos in their collections. A library's decision not to provide constitutionally protected material through its Internet-connected computers raises no greater constitutional concern.

Moreover, a public library may reasonably decide that, in order to avoid making certain inappropriate material available to its patrons, it will also decline to make available certain material that may be worthwhile. For example, a public library may decide not to collect a particular magazine because of its pornographic pictures, even though that same

magazine might contain worthwhile interviews with public figures. Relying on a similar judgment, a public library may decide to use filtering software that blocks material that is obscene, child pornography or harmful to minors, even though it may also block some material that falls outside those specific categories.

Appellees also fail to come to grips with the following critical facts: screening software overblocks only a small percentage of the total content of the Internet; much information that is blocked can be found elsewhere; and any library may unblock a site that has been erroneously blocked. See J.S. 23. Appellees raise several objections to the significance of those facts, but each is unpersuasive.

First, appellees refer to the amount of overblocking as "vast." ALA Mot. to Aff. 17; Multnomah County Resp. 13. In fact, however, filtering software erroneously blocks a fraction of 1% of the material on the Internet. J.S. 23. Second, ALA asserts (Mot. to Aff. 19) that there is no evidence that erroneously blocked information can often be found elsewhere. But the evidence shows that public libraries often carry books containing information on sensitive sexual issues. J.S. 23. The evidence also shows that when a search was performed using the term "breast cancer," the first 50 sites were not blocked. *Ibid.* There is nothing unique about those examples. They provide ample support for the conclusion that much information that is blocked can be found in other ways.

Third, ALA contends (Mot. to Aff. 20) that the possibility of unblocking is constitutionally inadequate because CIPA does not *require* a public library to unblock an erroneously blocked site. However, the more salient fact is that CIPA does not *prevent* a public library from unblocking an erroneously blocked site. Appellees have offered no evidence to suggest that libraries will not respond to reasonable unblocking requests just as they respond to other reasonable

patron requests. In any event, the possibility that a particular library might decide not to unblock a site does not render CIPA unconstitutional on its face.

Fourth, appellees assert that library patrons may be too embarrassed to ask for sites to be unblocked. ALA Mot. to Aff. 20- 21; Multnomah Resp. 16-17. But library patrons are accustomed to asking for assistance from librarians, *e.g.*, to locate material in the collection, to retrieve books on reserve, or to borrow materials from another library. There is no reason to anticipate that they will be any less willing to ask for assistance in obtaining information from the Internet. Moreover, appellees' notion that there is a constitutional right to acquire information in a public library without any risk of embarrassment is insupportable. Library patrons can always be observed by librarians and other members of the public; patrons must ordinarily identify themselves in order to check out material; and libraries make a record of the material that patrons check out. Those standard operating procedures may deter some persons from using a public library to acquire information, but that does not mean that a library's standard operating procedures are unconstitutional.

2. Appellees also contend that the use of filtering software is not narrowly tailored because there are alternatives that are less restrictive, such as the optional use of blocking software, enforcement of Internet use policies, training in Internet usage, steering patrons to selected sites, installation of privacy screens or recessed monitors, and placing unblocked computers in segregated areas. ALA Mot. to Aff. 21-22; Multnomah Resp. 14-15. But in deciding what information to collect from the Internet, a public library is not required to pursue the least restrictive alternative. A public library instead has considerable flexibility in deciding on the best approach.

In any event, most of the alternatives appellees have identified are directed to assisting individuals who wish to

avoid exposure to material that is obscene, child pornography, or harmful to minors and do not address the government's compelling interest in preventing the deliberate use of library computers to obtain access to such material and Congress's manifestly legitimate interest in preventing the use of federal assistance to facilitate such conduct. Enforcement of standard use policies would address those interests to an extent. But if enforcement took the form of aggressive monitoring of Internet use, that alternative would be more restrictive than the use of filtering software and would have a number of other undesirable consequences. See J.S. 25-26.

C. Appellees' Other Challenges Do Not Provide A Basis For Failing To Grant Plenary Review Of The Question Presented

Appellees argue that the district court's judgment may be affirmed on the alternative grounds that CIPA imposes an unconstitutional condition on the exercise of First Amendment rights, and that a library's use of filtering software constitutes an impermissible prior restraint on speech. ALA Mot. to Aff. 22-26; Multnomah County Resp. 17-19. The district court, however, did not resolve either of those contentions, and they are not directly presented here. Those contentions are in any event without merit.

1. Although ALA asserts an unconstitutional conditions claim (Mot. to Aff. 23-26), the courts of appeals that have addressed the issue have concluded that governmental entities, like public libraries, do not have First Amendment rights of their own. See J.S 27 n.6. ALA makes no effort to demonstrate that those holdings are incorrect. Instead, it argues (Mot. to Aff. 24) that CIPA imposes an unconstitutional condition on the First Amendment rights of library patrons. But ALA does not cite any decision of this Court that suggests that unconstitutional conditions analysis applies when the recipient of federal assistance itself lacks a viable constitutional claim. Moreover, ALA's assertion of an

unconstitutional conditions claim on behalf of library patrons collapses with appellees' claim that CIPA induces public libraries to violate the First Amendment rights of their patrons. For the reasons previously discussed, the latter claim is unmeritorious. Moreover, this Court's unconstitutional conditions cases establish that Congress may define a federally assisted program to include limits on speech-related activity, as long as federal recipients may engage in such activity outside the federal program. J.S. 27 n.6. Because CIPA permits libraries to decline to use filtering software at branches that do not receive Internet-related federal assistance, that standard is satisfied here.

2. Appellees' reliance (ALA Mot. to Aff. 22-23; Multnomah County Resp. 17-19) on the presumption against prior restraints is also misplaced. A library's use of filtering software does not impose a "restraint" on Internet content. The content that a filter blocks remains on the Internet and may be obtained from millions of computers throughout the world. A library's decision not to provide such material through its own computers is a collection decision, not a restraint on private speech. Acceptance of appellees' contrary view would lead to the remarkable conclusion that public libraries engage in prior restraints when they fail to provide pornographic magazines or xxx videos to their patrons.

* * * * *

For the foregoing reasons, as well as those set forth in the jurisdictional statement, the Court should note probable jurisdiction.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

OCTOBER 2002

SUPREME COURT U.S.
FILED
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OFFICE OF THE CLERK

No. 02-361

In the Supreme Court of the United States

UNITED STATES OF AMERICA, *ET AL.*
Appellants,

v.

AMERICAN LIBRARY ASSOCIATION, INC., *ET AL.*,
Appellees.

On Direct Appeal from the United States District Court for the Eastern District of Pennsylvania

BRIEF OF THE STATE OF TEXAS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

Whether public libraries' use of filtering devices on computers used by library patrons for Internet access violates those patrons' rights under the First Amendment.

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No. 02-361

In the Supreme Court of the United States

UNITED STATES OF AMERICA, *ET AL.*,
Appellants,

v.

AMERICAN LIBRARY ASSOCIATION, INC., *ET AL.*,
Appellees.

On Direct Appeal from the United States District Court
for the Eastern District of Pennsylvania

BRIEF OF THE STATE OF TEXAS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

The State of Texas, as *amicus curiae*, files this brief in support of Appellants and asks the Court to note probable jurisdiction.

INTEREST OF *AMICUS CURIAE*

The First Amendment issue in this case is of great importance to the people of Texas. The district court's erroneous decision that the First Amendment prohibits public libraries from utilizing filtering software on computers used by library patrons for access to the Internet will likely result in children being exposed to obscene, indecent, and harmful material—and inhibit efforts to combat Internet-related crimes against children. Moreover, the district court's erroneous First Amendment holding could prevent Texas from enacting and enforcing, as an exercise of its police powers, laws mandating or even encouraging use of filtering

software in its public libraries. Accordingly, whether the First Amendment permits public libraries to utilize filtering software for Internet-connected computers used by library patrons is an important issue the Court should decide.

Texas has given prevention and prosecution of computer and Internet-related crime—including child pornography—high priority. Two years ago Texas Attorney General John Cornyn created an Internet Bureau—a new division in the Texas Attorney General's Office that assists local law-enforcement agencies in combating computer and Internet-related crimes. The mission of the Internet Bureau is to provide a safe electronic environment for the communication of information and ideas and the transaction of commerce. This goal is threatened by the district court's ruling that libraries, and, by extension, other governmental entities, may not require or even encourage the use of Internet-filtering devices on publically provided Internet access to screen out obscene or harmful material.

Texas takes no position on Congress's ability, through its spending power, to command the use of Internet filters in public libraries or require their use by State or local governmental entities. *Amicus curiae* addresses only the effect of the district court's erroneous First Amendment analysis on a State's ability to effectively combat Internet-related crime and, through the use of its police powers, to enact and enforce laws related to Internet filtering in places where Internet access is publically available, to prevent children from being exposed to obscene, indecent, or harmful material.

ARGUMENT

I. THE FIRST AMENDMENT QUESTION IS SUBSTANTIAL.

"There is a vast amount of sexually explicit material available via the Internet." *Am. Library Ass'n, Inc. v. United States*, 201 F.Supp.2d 401, 420 (E.D. Pa. 2002). And children are seeing it. Based on interviews with a nationally representative sample of 1,501 young people ages 10 to 17 who used the Internet regularly, the National Center for Missing and Exploited Children and the Crimes Against Children Research Center found that one in four children had experienced an unwanted exposure to indecent pictures in the past year. DAVID FINKELHOR *ET AL.*, CRIMES AGAINST CHILDREN RESEARCH CENTER, ONLINE VICTIMIZATION: A REPORT ON THE NATION'S YOUTH 13 (2000). Indeed, accidental exposure to sexually explicit websites can be difficult to avoid. *Am. Library Ass'n*, 201 F.Supp.2d, at 419.

States, as well as the federal and local governments, have a strong interest in protecting children from viewing—in public libraries—the vast amount of sexually explicit material available over the Internet. They have an equally strong interest in protecting children from the secondary effects of the availability of these materials, such as the attraction to libraries or similar public places of persons who might victimize children. *Cf. City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48-49 (1986) (upholding zoning restrictions on adult theaters because such restrictions were aimed at preventing secondary, rather than primary, effects of such theaters). The ability to filter these materials through the use of software is an important weapon in States' and libraries' child-protection arsenals.

Simply put, public libraries cannot become places where there is a very real risk that children might be exposed—intentionally or unintentionally—to obscene, pornographic, or otherwise harmful materials. Parents should not be afraid to send their children to the

library, either because they might be exposed to such materials or because the library's free, filterless computers might attract people with a propensity to victimize children. Although, at present, filtering may be an imperfect technology, it remains a valuable and reasonable tool for protecting children that should not be forbidden to public libraries or to the government.

II. STRICT SCRUTINY DOES NOT APPLY TO A PUBLIC LIBRARY'S FILTERING OF OBSCENE, INDECENT, OR HARMFUL MATERIAL FROM PUBLICALLY PROVIDED INTERNET ACCESS.

Of the three recognized types of forums—the traditional public forum, the limited or designated public forum, and the nonpublic forum—only the traditional public forum, such as streets and parks, are subject to strict scrutiny so that any restriction must be narrowly tailored to achieve a compelling governmental interest. *See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). A limited or designated public forum may be limited to certain purposes, provided that any restrictions are reasonable with respect to those purposes and that the restrictions are viewpoint neutral. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (citing cases). And, in a nonpublic forum, restrictions may be based not only on content but also on "speaker identity" as long as the restrictions are "reasonable in light of the purpose served by the forum" and viewpoint neutral. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (citing *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 49 (1983)).

Because the government's ability to limit speech varies with the nature of the forum, correctly defining the forum is vital.[1] *See*

1. Should the Court agree with Appellants that a public library is not correctly viewed as a forum of any type and that any restriction on the contents of the library, including the Internet, need only meet a rational basis review, J.S., at 14-20, it is clear that the district court erred in not only applying strict scrutiny here, but in engaging in a forum analysis at all.

Cornelius, 473 U.S., at 797. This is where the district court stumbled.

Although the court determined that a public library is a limited public forum, *see Am. Library Ass'n*, 201 F.Supp.2d, at 457, it did not apply the "reasonableness" and viewpoint neutrality test necessitated by that forum. Instead, the district court essentially held that publically provided Internet access creates a public forum within a limited forum, requiring the application of strict scrutiny. "We are satisfied that when the government provides Internet access in a public library, it has created a designated public forum," *id.*, at 457, but "[i]n providing even filtered Internet access, public libraries create a public forum open to any speaker around the world to communicate with library patrons." *Id.*, at 410; *see id.*, 466-70 (analogizing the Internet to traditional public fora).

Applying this extraordinary reasoning, the district court held that "under the public forum doctrine," *id.*, at 489, the filtering was not narrowly tailored to meet a compelling governmental interest because material other than that which is pornographic, obscene, or harmful could be blocked as well. *See id.*; *see also id.*, at 470-84.

But by focusing solely on the Internet, and ignoring the environment in which the Internet is accessed, the district court's decision runs afoul of the Court's admonition that context is *always* a central concern when determining the permissibility of restrictions on speech. *See, e.g., Fed. Communications Comm'n v. Pacifica Found.*, 438 U.S. 726, 746-47 (1978) ("Indeed, we may assume, *arguendo*, that [the George Carlin "filthy words"] monologue would be protected in other contexts. Nonetheless, the

constitutional protection accorded to a communication . . . need not be the same in every context.").

The district court's *per se* characterization of the Internet as a traditional public forum—and its rote application of strict scrutiny, despite the fact that it had earlier determined that the point of access was in a limited public forum—has troubling implications. For instance, under the district court's analysis, the decision of a school to utilize Internet filtering software to shield children from obscene or harmful material similarly would be subject to strict scrutiny. It would be immaterial that the schools themselves are not considered to be a traditional public forum generally. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390-93 (1993) (school was not a public forum as to after-hours access by various groups). Under this reasoning, strict scrutiny would be required solely because of the district court's view that the Internet is viewed as a *per se* traditional public forum, regardless of the context in which it is accessed.

Rather than permit this approach to control, the appropriate level of scrutiny should be decided with reference to the entire context of the speech that is being restricted. *See Pacifica*, 438 U.S., at 746-47. Context matters because "[i]t is a characteristic of speech such as this that both its capacity to offend and its 'social value,' . . . vary with the circumstances." *Id.*

Indeed, this Court's First Amendment jurisprudence demonstrates not only that context matters, but that context can dictate whether a particular restriction on speech passes constitutional muster. *See id.* For instance, while upholding the imposition of a penalty against a broadcaster for airing George Carlin's "filthy words" monologue, the Court noted that such a monologue might be protected in another context. *See id.* Indeed, context—and, specifically, where the material was accessed—was the paramount consideration in *Pacifica*. The fact that a person, in

the privacy of his or her home, could switch the radio station and inadvertently be exposed to potentially disturbing material was an important factor in the Court's decision to uphold the restriction. *Id.*, at 748.

By focusing exclusively on the Internet, the district court ignored the Court's emphasis on context—which requires consideration of the forum in which potentially objectionable material is accessed. Because objectionable material is being accessed in a public library environment, the character of that environment should control the constitutional inquiry. And because a public library is not a public forum, a focus on the reasonableness of the restriction, not strict scrutiny, should apply.

III. Internet Filtering by Public Libraries Passes Constitutional Muster.

Because public libraries are not public fora, Internet filtering need only be viewpoint neutral and reasonable in light of the purpose served by the forum.[2] *See Rosenberger*, 515 U.S., at 829. Filtering satisfies this test.

Unlike restrictions on materials espousing a certain viewpoint, filtering does not discriminate based on viewpoint but instead restricts an entire genre from access that does not further the purposes of the library. *Cf. United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 812 (2000) (holding total daytime ban of sexually oriented broadcasts unconstitutional in part because certain speakers were targeted); *see also Rosenberger*, 515 U.S., at 829-30 (when determining whether the "exclusion of a class of speech is legitimate," Court has drawn a "distinction between, on the one hand, content discrimination, which may be permissible if it

---

2. Of course, if rational basis is the appropriate test, then it is easily met using the same rationale.

preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.").

Moreover, the use of filtering software is a reasonable response to the dangers posed by the large quantity of sexually oriented material available on the Internet. And filtering is reasonable in light of the nature of the public library forum. A library is a place for reading, research, and study, all of which require a quiet atmosphere with minimal distractions. Moreover, libraries are frequented by children. Even children too young to read come to libraries to attend story hours or other educational activities or simply accompany their parents or older siblings. And, it is likely that parents regard public libraries as an appropriate, educational place for children to spend time after school or on weekends.

Accordingly, public libraries are not appropriate places for adults to view material that is indecent or harmful to minors. If an adult were viewing such material on a library computer, it easily could be visible to people on nearby computers or to passersby—including children. The appearance on a library computer screen of sexually explicit material could disrupt the quietude of the library. In addition, it could harm children within viewing range. Most troubling are the potential secondary effects of prohibiting the use of filters. The resulting free, unfiltered access could attract people likely to victimize children to public libraries.

Filtering software, while still technologically imperfect, minimizes the chance that children will be exposed to obscene, indecent, or harmful material. Filtering software also minimizes the potential disruption of the library's quiet environment. Moreover, adults who wish to access material blocked by the filtering software may do so at a cyber café or elsewhere. For these reasons, the use of filtering software is reasonable, viewpoint neutral, and passes constitutional muster.

PRAYER

The Court should note probable jurisdiction.

Respectfully submitted,

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(16)

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No. 02-361

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

AMERICAN LIBRARY ASSOCIATION, ET AL.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOINT APPENDIX
(VOLUME 1)

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APPEAL FILED: SEPTEMBER 6, 2002
PROBABLE JURISDICTION NOTED: NOVEMBER 12, 2002

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(PHILADELPHIA)

Civil Docket No. 01-CV-1303

AMERICAN LIBRARY ASSOCIATION, INC., ET AL.,
PLAINTIFFS

v.

UNITED STATES, ET AL., DEFENDANTS

RELEVANT DOCKET ENTRIES

DATE	DOCKET NUMBER	DOCKET ENTRY
3/20/01	1	Complaint for the Declaratory and Injunctive Relief. filing fee $ 150 receipt # 756926 (jmp) [Entry date 03/20/01]
		* * * * *
3/26/01	2	ORDER THAT INASMUCH AS SECTION 561 OF THE COMMUNICATIONS DECENCY ACT OF 1996 REQUIRES A DISTRICT COURT OF THREE JUDGES TO BE CONVENED IN ANY CIVIL ACTION CHALLENGING THE CONSTITU-

DATE	DOCKET NUMBER	DOCKET ENTRY
		TIONALITY, ON ITS FACE, OF ANY PROVISION OF THAT STATUTE, AND I HAVE BEEN REQUESTED TO CONVENE SUCH A COURT BY THE DISTRICT JUDGE TO WHOM THE PLAINTIFFS' REQUEST WAS MADE (SEE ATTACHED), PURSUANT TO THE PROVISIONS OF 28 U.S.C. SECTION 2284, I DESIGNATE THE HONORABLE EDWARD R. BECKER, UNITED STATES CIRCUIT JUDGE, AND THE HONORABLE HARVEY BARTLE, III, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA, TO SIT WITH THE HONORABLE JOHN P. FULLAM, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA, AS MEMBERS OF THE COURT FOR THE HEARING AND DETERMINATION OF THE ABOVE-CAPTIONED MATTERS. (SIGNED BY

DATE	DOCKET NUMBER	DOCKET ENTRY
		EDWARD R. BECKER, CHIEF JUDGE THIRD JUDICIAL CIRCUIT) 3/26/01 ENTERED AND COPIES MAILED. (fp) Entry date 03/26/01] [Edit date 09/12/01]
		* * * * *
5/15/01	15	ORDER THAT ACTION NOS. 01-1303 AND 01-1322 ARE CONSOLIDATED FOR ALL PURPOSES UNDER ACTION NO. 01-1303; DEFTS SHALL FILE A MOTION TO DISMISS BY 6/8/01; PLFFS SHALL FILE THEIR RESPONSES BY 6/29/01; DEFTS MAY FILE REPLY BRIEF BY 7/13/01 PLFFS SHALL PROVIDE DEFTS WITH THEIR PROPOSED DISCOVERY PLAN BY 5/29/01; DEFTS SHALL PROVIDE PLFFS A COUNTER-PROPOSAL BY 6/15/01; A DISCOVERY CONFERENCE WILL BE HELD 6/26/01 AT 10:00; ONE DAY PRIOR TO

DATE	DOCKET NUMBER	DOCKET ENTRY
		SAID CONFERENCE, PATIES SHALL SUBMIT COPIES OF PROPOSED DISCOVERY PLAN(S) TO JUDGES BECKER, FULLAM AND BARTLE; AND ARGUMENT ON MOTION TO DISMISS WILL BE HELD ON 7/23/01 AT 11:00. (SIGNED BY JUDGE JOHN P. FULLAM) 5/15/01 ENTERED AND COPIES MAILED AND FAXED. (mld) [Entry date 05/15/01] [Edit date 05/15/01]
		* * * * *
6/8/01	18	MOTION by DEFENDANT UNITED STATES, DEFENDANT MICHAEL POWELL, DEFENDANT FED. COMMUNICATIONS, DEFENDANT BEVERLY SHEPPARD, DEFENDANT INSTITUTE OF MUSEUM TO DISMISS PLFFS' COMPLAINT , CERTIFICATE OF SERVICE. (mld) [Entry date 06/08/01]

DATE	DOCKET NUMBER	DOCKET ENTRY
6/8/01	19	Memorandum of Law by DEFENDANT UNITED STATES, DEFENDANT MICHAEL POWELL, DEFENDANT FED. COMMUNICATIONS, DEFENDANT BEVERLY SHEPPARD, DEFENDANT INSTITUTE OF MUSEUM in support of their MOTION TO DISMISS PLFFS' COMPLAINT, Certificate of Service. (mld) [Entry date 06/08/01]
		* * * * *
6/29/01	21	Response by PLAINTIFF AMERICAN LIBRARY, PLAINTIFF FREEDOM TO READ, PLAINTIFF ALASKA LIBRARY ASSOC, PLAINTIFF CALIFORNIA LIBARY, PLAINTIFF NEW ENGLAND LIBARY, PLAINTIFF NEW YORK LIBRARY, PLAINTIFF ASSOC.OF COMMUNITY, PLAINTIFF FRIENDS OF THE PHILA, PLAINTIFF PA. ALLIANCE FOR DEM, PLAINTIFF ELIZABETH HRENDA,

DATE	DOCKET NUMBER	DOCKET ENTRY
		PLAINTIFF C. DONALD WEINBERG in opposition to DEFTS' MOTION TO DISMISS PLFFS' COMPLAINT, Memorandum, Certificate of Service. (mld) [Entry date 07/02/01]
		* * * * *
7/13/01	23	Reply Brief by DEFENDANT UNITED STATES, DEFENDANT MICHAEL POWELL, DEFENDANT FED.COMMUNICATIONS, DEFENDANT BEVERLY SHEPPARD, DEFENDANT INSTITUTE OF MUSEUM in support of their MOTION TO DISMISS PLFFS' COMPLAINT, Certificate of Service. (mld) [Entry date 07/13/01] [Edit date 07/13/01]
7/26/01	24	MEMORANDUM AND ORDER THAT DEFTS' MOTIONS TO DISMISS THE COMPLAINTS ARE DENIED. (SIGNED BY JUDGE JOHN P. FULLAM) 7/26/01 ENTERED AND COPIES MAILED AND FAXED. (mld) [Entry date 07/26/01]
		* * * * *

DATE	DOCKET NUMBER	DOCKET ENTRY
9/10/01	34	Answer to Complaint by DEFENDANT UNITED STATES, DEFENDANT MICHAEL POWELL, DEFENDANT INSTITUTE OF MUSEUM, DEFENDANT BEVERLY SHEPPARD, DEFENDANT FED.COMMUNICATIONS, Certificate of Service. (np) [Entry date 09/12/01] [Edit date 09/12/01]
		* * * * *
11/15/01	37	ORDER THAT IN ACCORDANCE WITH THE UNDERSTANDINGS REACHED AT A TELEPHONE CONFERENCE HELD THIS DATE, THAT TRIAL OF THIS CASE IS SET TO COMMENCE ON 3/25/02; PLFFS' PRELIMINARY PRETRIAL MEMORANDUM WILL BE FILED BY 12/14/01; DEFTS' PRELIMINARY PRETRIAL MEMORANDUM WILL BE FILED BY 12/28/01. (SIGNED BY JUDGE JOHN P. FULLAM) 11/15/01 ENTERED AND COPIES MAILED AND FAXED BY CHAMBERS. (mld) [Entry date 11/15/01]

DATE	DOCKET NUMBER	DOCKET ENTRY
		* * * * *
3/20/02	47	Joint Trial Stipulations of all Parties. (FILED UNDER SEAL) (mld) [Entry date 03/21/02]
3/20/02	48	Redacted Joint Trial Stipulations of all Parties, Certificate of Service. (mld) [Entry date 03/21/02]
		* * * * *
3/26/02	52	Minute entry re: Civil Non Jury Trial held 3/25/02 DAY 1 Witnesses called and sworn: Motion of Non Party N2H2 for limited intervention: Motion GRANTED. (jpd) [Entry date 03/26/02] [Edit date 03/26/02]
		* * * * *
3/27/02	54	Minute entry re: 3/26/02 civil non-jury trial day 2. Geoffrey Nunberg, resumes; witnesses sworn. (mld) [Entry date 03/27/02]
3/27/02	55	Transcript for Trial held on 3/25/02. (mld) [Entry date 03/27/02]

DATE	DOCKET NUMBER	DOCKET ENTRY
3/29/02	56	Minute entry: Non-Jury Trial resumes 3/28/02. (td) [Entry date 03/29/02]
3/29/02	57	Transcript for Trial of 3/26/02. (td) [Entry date 03/29/02]
3/29/02	58	Minute entry re: Non Jury Trial Day 3 held 3/28/02: Witnesses called and sworn. (jpd) [Entry date 03/29/02]
3/29/02	59	Minute entry re: Non Jury Trial Day 4 held 3/29/02: Witnesses called and sworn. (jpd) [Entry date 03/29/02]
3/29/02	60	Minute entry re: 3/29/02 non-jury trial, day 4. Remarks by the Court; witnesses called and sworn in DEFTS' case. (mld) [Entry date 04/01/02]
4/1/02	61	Minute entry re: 4/1/02 non-jury trial, day 5. Remarks by the Court; witnesses called and sworn in DEFTS' case. (mld) [Entry date 04/01/02]
4/2/02	62	Transcript for Trial held 3/28/02. (mld) [Entry date 04/03/02]
4/2/02	63	Transcript for Trial held 3/29/02. (mld) [Entry date 04/03/02]

DATE	DOCKET NUMBER	DOCKET ENTRY
4/2/02	64	Transcript for Trial held 4/1/02. (mld) [Entry date 04/03/02]
4/2/02	65	Minute entry re: 4/2/02 non-jury trial, day 6. Remarks by the Court; PLFFS' case resumes; witnesses called and sworn in PLFFS' case. (mld) [Entry date 04/03/02]
4/3/02	66	Minute entry re: 4/3/02 non-jury trial, day 7. Remarks by the Court; witnesses called and sworn in DEFTS' case; exhibits moved into evidence by Atty BHATTACHARYYA on behalf of DEFTS; DEFTS rest; PLFFS rest. (mld) [Entry date 04/03/02]
4/3/02	67	Transcript for Trial held 4/2/02. (mld) [Entry date 04/04/02]
4/4/02	68	Minute entry re: 4/4/02 non-jury trial, day 8. Remarks by the Court; closing remarks by Attys SMITH and HANSEN on behalf of PLFFS; closing remarks by Atty BHATTACHARYYA on behalf of DEFTS; rebuttal by Atty SMITH. By the Court: counsel for both

DATE	DOCKET NUMBER	DOCKET ENTRY
		sides to submit to court Findings of Facts and Briefs by 4/11/02. (mld) [Entry date 04/05/02]
4/5/02	69	Transcript for Trial held 4/3/02. (mld) [Entry date 04/05/02]
4/9/02	70	Transcript for Trial held 4/4/02. (mld) [Entry date 04/09/02]
4/11/02	71	Joint Post-Trial Brief by PLAINTIFF AMERICAN LIBRARY, PLAINTIFF FREEDOM TO READ, PLAINTIFF ALASKA LIBRARY ASSOC, PLAINTIFF CALIFORNIA LIBARY, PLAINTIFF NEW ENGLAND LIBARY, PLAINTIFF NEW YORK LIBRARY, PLAINTIFF ASSOC.OF COMMUNITY, PLAINTIFF FRIENDS OF THE PHILA, PLAINTIFF PA. ALLIANCE FOR DEM, PLAINTIFF ELIZABETH HRENDA, PLAINTIFF C. DONALD WEINBERG, Certificate of Service. (mld) [Entry date 04/12/02]

DATE	DOCKET NUMBER	DOCKET ENTRY
4/11/02	72	Joint Proposed Findings of Facts by PLAINTIFF AMERICAN LIBRARY, PLAINTIFF FREEDOM TO READ, PLAINTIFF ALASKA LIBRARY ASSOC, PLAINTIFF CALIFORNIA LIBARY, PLAINTIFF NEW ENGLAND LIBARY, PLAINTIFF NEW YORK LIBRARY, PLAINTIFF ASSOC. OF COMMUNITY, PLAINTIFF FRIENDS OF THE PHILA, PLAINTIFF PA. ALLIANCE FOR DEM, PLAINTIFF ELIZABETH HRENDA, PLAINTIFF C. DONALD WEINBERG, Certificate of Service. (mld) [Entry date 04/12/02] [Edit date 04/12/02]
4/12/02	73	Post-Trial Brief by DEFENDANT UNITED STATES, DEFENDANT MICHAEL POWELL, DEFENDANT FED. COMMUNICATIONS, DEFENDANT BEVERLY SHEPPARD, DEFENDANT INSTITUTE OF MUSEUM, Certificate of Service. (mld) [Entry date 04/12/02]

DATE	DOCKET NUMBER	DOCKET ENTRY
4/12/02	74	Proposed Findings of Facts by DEFENDANT UNITED STATES, DEFENDANT MICHAEL POWELL, DEFENDANT FED.COMMUNICATIONS, DEFENDANT BEVERLY SHEPPARD, DEFENDANT INSTITUTE OF MUSEUM, Certificate of Service. (mld) [Entry date 04/12/02]
4/18/02	75	Post-Trial Reply Brief by DEFENDANT UNITED STATES, DEFENDANT MICHAEL POWELL, DEFENDANT FED.COMMUNICATIONS, DEFENDANT BEVERLY SHEPPARD, DEFENDANT INSTITUTE OF MUSEUM, Certificate of Service. (mld) [Entry date 04/18/02]
4/18/02	76	Supplemental Proposed Findings of Facts by PLAINTIFF AMERICAN LIBRARY, PLAINTIFF FREEDOM TO READ, PLAINTIFF ALASKA LIBRARY ASSOC, PLAINTIFF CALIFORNIA LIBARY, PLAINTIFF NEW ENGLAND

DATE	DOCKET NUMBER	DOCKET ENTRY
		LIBARY, PLAINTIFF NEW YORK LIBRARY, PLAINTIFF ASSOC. OF COMMUNITY, PLAINTIFF FRIENDS OF THE PHILA, PLAINTIFF PA. ALLIANCE FOR DEM, PLAINTIFF ELIZABETH HRENDA, PLAINTIFF C. DONALD WEINBERG in response to DEFENDANTS' Proposed Findings of Facts, Certificate of Service. (mld) [Entry date 04/19/02]
4/18/02	77	Joint Post-Trial Reply Brief by PLAINTIFF AMERICAN LIBRARY, PLAINTIFF FREEDOM TO READ, PLAINTIFF ALASKA LIBRARY ASSOC, PLAINTIFF CALIFORNIA LIBARY, PLAINTIFF NEW ENGLAND LIBARY, PLAINTIFF NEW YORK LIBRARY, PLAINTIFF ASSOC.OF COMMUNITY, PLAINTIFF FRIENDS OF THE PHILA, PLAINTIFF PA. ALLIANCE FOR DEM, PLAINTIFF ELIZABETH HRENDA, PLAINTIFF C. DONALD WEINBERG, Certificate of Service. (mld) [Entry date 04/19/02]

* * * * *

DATE	DOCKET NUMBER	DOCKET ENTRY
5/31/02	79	OPINION AND ORDER DATED MAY 31, 2002 THAT JUDGMENT IS ENTERED IN FAVOR OF THE PLAINTIFFS AND AGAINST THE DEFENDANTS, DECLARING THAT 1712(a)(2) AND 1721(b) OF THE CHILDREN'S INTERNET PROTECTION ACT, 20 U.S.C. 9134(f) AND 47 U.S.C. 254(h)(6), ARE FACIALLY INVALID UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION; AND THE UNITED STATES, MICHAEL POWELL, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE FEDERAL COMMUNICATIONS COMMISSION, THE FEDERAL COMMUNICATION COMMISSION, BEVERLY SHEPPARD, IN HER OFFICIAL CAPACITY AS ACTING DIRECTOR OF THE INSTITUTE OF MUSEUM AND LIBRARY SERVICES, AND THE INSTITUTE OF MUSEUM AND LIBRARY SERVICES ARE

DATE	DOCKET NUMBER	DOCKET ENTRY
		PERMANENTLY ENJOINED FROM WITHHOLDING FEDERAL FUNDS FROM ANY PUBLIC LIBRARY FOR FAILURE TO COMPLY WITH 1712(a)(2) AND 1712(b) OF THE CHILDREN'S INTERNET PROTECTION ACT, 20 U.S.C. 9134(f) AND 47 U.S.C. 254(h)(6). (SIGNED BY CHIEF JUDGE EDWARD R. BECKER, JUDGE JOHN P. FULLAM AND JUDGE HARVEY BARTLE, III) 5/31/02 ENTERED AND COPIES MAILED. (mc) [Entry date 05/31/02]
6/20/02	80	Notice of appeal to the UNITED STATES SUPREME COURT by DEFENDANT UNITED STATES, DEFENDANT MICHAEL POWELL, DEFENDANT FED.COMMUNICATIONS, DEFENDANT BEVERLY SHEPPARD, DEFENDANT INSTITUTE OF MUSEUM. Copies to: JUDGE JOHN P. FULLAM, JUDGE HARVEY BARTLE, III, USCA CHIEF

DATE	DOCKET NUMBER	DOCKET ENTRY
		JUDGE EDWARD R. BECKER, and JANET M. LARUE, MEERA DEO, LEE TIEN, DAVID L. SOBEL, CHARLES F. SIMMS, FRANK SCIBILIA, ANDREW L. LEE, STEFANIE S. KRAUS, CHRISTOPHER A. HANSEN, ANN ELIZABETH BEESON, STEFAN PRESSER, ANDREA GACKI, LISA M. BORNSTEIN, TIMOTHY ZICK, THEODORE C. HIRT, ANNETTA FOSTER GIVHAN, SCOTT A. COFFINA, KATHERINE A. FALLOW, JENNIFER S. MARTINEZ, PAUL M. SMITH, DANIEL MACH, THERESA A. CHMARA, WAYNE C. STANSFIELD, ROBERT A. NICHOLAS, Certificate of Service. (mld) [Entry date 06/20/02]

* * * * *

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(PHILADELPHIA)

Civil Docket No. 01-CV-1322

MULTNOMAH COUNTY PUBLIC LIBRARY, ET AL.,
PLAINTIFFS

v.

UNITED STATES, ET AL. DEFENDANTS

RELEVANT DOCKET ENTRIES

DATE	DOCKET NUMBER	DOCKET ENTRY
3/20/01	1	Complaint. filing fee $150 receipt #756978 (aam) [Entry date 03/20/01]
		* * * * *
3/26/01	3	ORDER THAT INASMUCH AS SECTION 561 OF THE COMMUNICATIONS DECENCY ACT OF 1996 REQUIRES A DISTRICT COURT OF THREE JUDGES TO BE CONVENED IN ANY CIVIL ACTION CHALLENGING THE CONSTITUTIONALITY, ON ITS FACE, OF ANY PROVISION OF THAT STATUE, AND I HAVE BEEN REQUESTED TO CON

DATE	DOCKET NUMBER	DOCKET ENTRY
		VENE SUCH A COURT BY THE DISTRICT JUDGE TO WHOM THE PLAINTIFFS' REQUEST WAS MADE, PURSUANT TO THE PROVISIONS OF 28 U.S.C. & 2284, I DESINGATE THE HONORABLE EDWARD R. BECKER, UNITED STATES CIRCUIT JUDGE, AND THE HONORABLE HARVEY BARTLE, III, UNITED STATES DISTRICT JUDGE, TO SIT WITH THE HONORABLE JOHN P. FULLEM, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA, AS MEMBERS OF THE COURT FOR THE HEARING AND DETERMINATION OF THE ABOVE-CAPTIONED MATTERS (SIGNED BY CHIEF JUDGE THIRD CIRCUIT EDWARD R. BECKER) 3/26/01 ENTERED AND COPIES MAILED. (jl) [Entry date 03/26/01]
		* * * * *

DATE	DOCKET NUMBER	DOCKET ENTRY
5/15/01	8	ORDER THAT ACTION NOS. 01-1303 AND 01-1322 ARE CONSOLIDATED FOR ALL PURPOSES UNDER ACTION NO. 01-1303; AND DEFTS SHALL FILE A MOTION TO DISMISS BY 6/8/01; PLFFS SHALL FILE THEIR RESPONSES BY 6/29/01; DEFTS MAY FILE REPLY BRIEF BY 7/13/01; PLFFS SHALL PROVIDE DEFTS WITH THEIR PROPOSED DISCOVERY PLAN BY 5/29/01; DEFTS SHALL PROVIDE PLFFS A COUNTER-PROPOSAL BY 6/15/01; A DISCOVERY CONFERENCE WILL BE HELD ON 6/26/01 AT 10:00; AND ARGUMENT ON MOTION TO DISMISS WILL BE HELD 7/23/01 AT 11:00. (SIGNED BY JUDGE JOHN P. FULLAM) 5/15/01 ENTERED AND COPIES MAILED AND FAXED. (mld) [Entry date 05/15/01] [Edit date 05/15/01]
*	*	* * * *

DATE	DOCKET NUMBER	DOCKET ENTRY
6/8/01	—	MOTION by DEFENDANT UNITED STATES, DEFENDANT FEDERAL COMMUNICATION, DEFENDANT INSTITUTE OF MUSEUM TO DISMISS PLFFS' COMPLAINT, CERTIFICATE OF SERVICE. (See case 01-1303, paper #18) (mld) [Entry date 06/08/01] [Edit date 06/08/01]
6/8/01	—	Memorandum of Law by DEFENDANT UNITED STATES, DEFENDANT FEDERAL COMMUNICATION, DEFENDANT INSTITUTE OF MUSEUM in support of their MOTION TO DISMISS PLFFS' COMPLAINT, Certificate of Service. (See case 01-1303, paper #19) (mld) [Entry date 06/08/01] [Edit date 06/08/01]
*	*	* * * *
6/29/01	9	Response by PLAINTIFF MULTNOMAH COUNTY, PLAINTIFF CONNECTICUT LIBRARY, PLAINTIFF MAINE LIBRARY ASSOC., PLAINTIFF SANTA CRUZ PUBLIC, PLAINTIFF SOUTH CENTRAL LIBRAR, PLAINTIFF WESTCHESTER

DATE	DOCKET NUMBER	DOCKET ENTRY
		LIBRARY, PLAINTIFF WISCONSIN LIBRARY, PLAINTIFF MARK BROWN, PLAINTIFF SHERRON DIXON, PLAINTIFF JAMES GERINGER, PLAINTIFF MARNIQUE TYNESHA OVERBY, PLAINTIFF EMMALYN ROOD, PLAINTIFF WILLIAM J. ROSENBAUM, PLAINTIFF CAROLYN C. WILLIAMS, PLAINTIFF QUIANA WILLIAMS, PLAINTIFF AFRAIDTOASK.COM, PLAINTIFF ALAN GUTTMACHER INST, PLAINTIFF ETHAN INTERACTIVE, PLAINTIFF NATURIST ACTION, PLAINTIFF WAYNE L. PARKER, PLAINTIFF PLANNED PARENTHOOD, PLAINTIFF PLANETOUT.COM, PLAINTIFF JEFFERY POLLOCK, PLAINTIFF SAFERSEX.ORG to DEFTS' MOTION TO DISMISS PLFFS' COMPLAINT, Certificate of Service. (mld) [Entry date 07/02/01]
		* * * * *
7/13/01	—	Reply Brief by DEFENDANT UNITED STATES, DEFENDANT FEDERAL COMMUNICATIO, DEFENDANT INSTITUTE OF MU

DATE	DOCKET NUMBER	DOCKET ENTRY
		SEUM in support of their MOTION TO DISMISS PLFFS' COMPLAINT, Certificate of Service. (See case 01-1303, paper #23) (mld) [Entry date 07/13/01]
7/26/01	12	MEMORANDUM AND ORDER THAT DEFTS' MOTIONS TO DISMISS THE COMPLAINTS ARE DENIED. (SIGNED BY JUDGE JOHN P. FULLAM) 7/26/01 ENTERED AND COPIES MAILED AND FAXED. (mld) [Entry date 07/26/01]
		* * * * *
9/10/01	15	Answer to Complaint by DEFENDANT UNITED STATES, DEFENDANT FEDERAL COMMUNICATION, DEFENDANT INSTITUTE OF MUSEUM, Certificate of Service. (mld) [Entry date 09/12/01]
		* * * * *
11/15/01	17	ORDER THAT IN ACCORDANCE WITH THE UNDERSTANDINGS REACHED AT AT A TELEPHONE CONFERENCE HELD THIS DATE, THAT TRIAL OF THE

DATE	DOCKET NUMBER	DOCKET ENTRY
		CASE IS SET TO COMMENCE ON 3/25/02; PLFFS' PRELIMINARY PRETRIAL MEMORANDUM WILL BE FILED BY 12/14/01; DEFTS' PRELIMINARY PRETRIAL MEMORANDUM WILL BE FILED BY 12/28/01. (SIGNED BY JUDGE JOHN P. FULLAM) 11/15/01 ENTERED AND COPIES MAILED AND FAXED BY CHAMBERS. (mld) [Entry date 11/15/01]
		* * * * *
3/20/02	—	Joint Trial Stipulations of all Parties. (FILED UNDER SEAL) (See case 01-1303, paper #47) (mld) [Entry date 03/21/02]
3/20/02	—	Redacted Joint Trial Stipulations of all Parties, Certificate of Service. (See case 01-1303, paper #48) (mld) [Entry date 03/21/02]
		* * * * *
3/26/02	—	Minute entry re: Civil Non Jury Trial held 3/25/02 Day 1: Witnesses called and sworn: Motion of Non Party N2H2 for limited intervention: Motion GRANTED. (See paper #52 in 01-cv-1303). (jpd) [Entry date 03/26/02]
		* * * * *

DATE	DOCKET NUMBER	DOCKET ENTRY
3/27/02	—	Minute entry re: 3/26/02 civil non-jury trial day 2. Geoffrey Nunberg, resumes; witnesses sworn. (See case 01-1303, paper #54) (mld) [Entry date 03/27/02]
3/27/02	—	Transcript for Trial held on 3/25/02. (See case 01-1303, paper #55) (mld) [Entry date 03/27/02]
3/29/02	—	Minute entry: Non-Jury Trial resumes 3/28/02. (See 01-1303 paper #56) (td) [Entry date 03/29/02]
3/29/02	—	Transcript for Trial held 3/26/02. (see 01-1303 paper #57) (td) [Entry date 03/29/02]
3/29/02	—	Minute entry re: Non Jury Trial Day 3 held 3/28/02: Witnesses called and sworn. (See Paper #58 in 01-cv-1303) (jpd) [Entry date 03/29/02]
3/29/02	—	Minute entry re: Non Jury Trial Day 4 held 3/29/02: Witnesses called and sworn. (See paper #59 in 01-1303) (jpd) [Entry date 03/29/02]
3/29/02	—	Minute entry re: 3/29/02 non-jury trial, day 4. Remarks by the Court; witnesses called and sworn in DEFTS' case. (See case 01-1303, paper #60) (mld) [Entry date 04/01/02]

DATE	DOCKET NUMBER	DOCKET ENTRY
4/1/02	—	Minute entry re: 4/1/02 non-jury trial, day 5. Remarks by the Court; witnesses called and sworn in DEFTS' case. (See case 01-1303, paper #61) (mld) [Entry date 04/01/02]
4/2/02	—	Transcript for Trial held 3/28/02. (See case 01-1303, paper #62) (mld) [Entry date 04/03/02]
4/2/02	—	Transcript for Trial held 3/29/02. (See case 01-1303, paper #63) (mld) [Entry date 04/03/02]
4/2/02	—	Transcript for Trial held 4/1/02. (See case 01-1303, paper #64) (mld) [Entry date 04/03/02]
4/2/02	—	Minute entry re: 4/2/02 non-jury trial, day 6. Remarks by the Court; PLFFS' case resumes; witnesses called and sworn in PLFFS' case. (See case 01-1303, paper #65) (mld) [Entry date 04/03/02]
4/3/02	—	Minute entry re: 4/3/02 non-jury trial, day 7. Remarks by the Court; witnesses called and sworn in DEFTS' case; exhibits moved into

DATE	DOCKET NUMBER	DOCKET ENTRY
		evidence by Atty BHATTACHARYYA on behalf of DEFTS; DEFTS rest; PLFFS rest. (See case 01-1303, paper #66) (mld) [Entry date 04/03/02]
4/3/02	—	Transcript for Trial held 4/2/02. (See case 01-1303, paper #67) (mld) [Entry date 04/04/02]
4/4/02	—	Minute entry re: 4/4/02 non-jury trial, day 8. Remarks by the Court; closing remarks by Attys SMITH and HANSEN on behalf of PLFFS; closing remarks by Atty BHATTACHARYYA on behalf of DEFTS; rebuttal by Atty SMITH. By the Court: Counsel for both sides to submit to Court Findings of Facts and Briefs by 4/11/02. (See case 01-1303, paper #68) (mld) [Entry date 04/05/02] [Edit date 04/05/02]
4/5/02	—	Transcript for Trial held 4/3/02. (See case 01-1303, paper #69) (mld) [Entry date 04/05/02]
4/9/02	—	Transcript for Trial held 4/4/02. (See case 01-1303, paper #70) (mld) [Entry date 04/09/02]

DATE	DOCKET NUMBER	DOCKET ENTRY
4/11/02	—	Joint Post-Trial Brief by PLAINTIFF MULTNOMAH COUNTY, PLAINTIFF CONNECTICUT LIBRARY, PLAINTIFF MAINE LIBRARY ASSOC., PLAINTIFF SANTA CRUZ PUBLIC, PLAINTIFF SOUTH CENTRAL LIBRAR, PLAINTIFF WESTCHESTER LIBRARY, PLAINTIFF WISCONSIN LIBRARY, PLAINTIFF MARK BROWN, PLAINTIFF SHERRON DIXON, PLAINTIFF JAMES GERINGER, PLAINTIFF MARNIQUE TYNESHA OVERBY, PLAINTIFF EMMALYN ROOD, PLAINTIFF WILLIAM J. ROSENBAUM, PLAINTIFF CAROLYN C. WILLIAMS, PLAINTIFF QUIANA WILLIAMS, PLAINTIFF AFRAIDTOASK.COM, PLAINTIFF ALAN GUTTMACHER INST, PLAINTIFF ETHAN INTERACTIVE, PLAINTIFF NATURIST ACTION, PLAINTIFF WAYNE L. PARKER, PLAINTIFF PLANNED PARENTHOOD, PLAINTIFF PLANETOUT.COM, PLAINTIFF JEFFERY POLLOCK, PLAINTIFF SAFERSEX.ORG, Certificate of Service. (See case 01-1303, paper #71) (mld) [Entry date 04/12/02]

DATE	DOCKET NUMBER	DOCKET ENTRY
4/11/02	—	Joint Proposed Findings of Facts by PLAINTIFF MULTNOMAH COUNTY, PLAINTIFF CONNECTICUT LIBRARY, PLAINTIFF MAINE LIBRARY ASSOC., PLAINTIFF SANTA CRUZ PUBLIC, PLAINTIFF SOUTH CENTRAL LIBRAR, PLAINTIFF WESTCHESTER LIBRARY, PLAINTIFF WISCONSIN LIBRARY, PLAINTIFF MARK BROWN, PLAINTIFF SHERRON DIXON, PLAINTIFF JAMES GERINGER, PLAINTIFF MARNIQUE TYNESHA OVERBY, PLAINTIFF EMMALYN ROOD, PLAINTIFF WILLIAM J. ROSENBAUM, PLAINTIFF CAROLYN C. WILLIAMS, PLAINTIFF QUIANA WILLIAMS, PLAINTIFF AFRAID TOASK.COM, PLAINTIFF ALAN GUTTMACHER INST, PLAINTIFF ETHAN INTERACTIVE, PLAINTIFF NATURIST ACTION, PLAINTIFF WAYNE L. PARKER, PLAINTIFF PLANNED PARENTHOOD, PLAINTIFF PLANETOUT.COM, PLAINTIFF JEFFERY POLLOCK,

DATE	DOCKET NUMBER	DOCKET ENTRY
		PLAINTIFF SAFERSEX.ORG, Certificate of Service. (See case 01-1303, paper #72) (mld) [Entry date 04/12/02]
4/12/02	—	Post-Trial Brief by DEFENDANT UNITED STATES, DEFENDANT FEDERAL COMMUNICATIO, DEFENDANT INSTITUTE OF MUSEUM, Certificate of Service. (See case 01-1303, paper #73) (mld) [Entry date 04/12/02]
4/12/02	—	Proposed Findings of Facts by DEFENDANT UNITED STATES, DEFENDANT FEDERAL COMMUNICATIO, DEFENDANT INSTITUTE OF MUSEUM, Certificate of Service. (See case 01-1303, paper #74) (mld) [Entry date 04/12/02]
		* * * * *
5/31/02	22	OPINION AND ORDER DATED MAY 31, 2002 THAT JUDGMENT IS ENTERED IN FAVOR THE PLFFS AND AGAINST THE DEFTS, DECLARING THAT 1712(a)(2) AND 1721(b) OF THE CHILDREN'S INTERNET PROTECTION ACT, 20 U.S.C. 9134(f) AND 47 U.S.C. 254(h)(6), ARE

DATE	DOCKET NUMBER	DOCKET ENTRY
		FACIALLY INVALID UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION; AND THE UNITED STATES, MICHAEL POWELL, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE FEDERAL COMMUNICATIONS COMMISSION, THE FEDERAL COMMUNICATIONS COMMISSION, BEVERLY SHEPPARD, IN HER OFFICIAL CAPACITY AS ACTING DIRECTOR OF THE INSTITUTE OF MUSEUM AND LIBRARY SERVICES, AND THE INSTITUTE OF MUSEUM AND LIBRARY SERVICES ARE PERMANENTLY ENJOINED FROM WITHHOLDING FEDERAL FUNDS FROM ANY PUBLIC LIBRARY FOR FAILURE TO COMPLY WITH 1712(a)(2) AND 1721(b) OF THE CHILDREN'S INTERNET PROTECTION ACT, 20 U.S.C. 9134(f) AND 47 U.S.C 254(h)(6). (SIGNED BY CHIEF JUDGE EDWARD R. BECKER, JUDGE JOHN P. FULLAM, JUDGE HARVEY BARTLE, III) 5/31/02 ENTERED AND COPIES MAILED. (mc) [Entry date 05/31/02]

DATE	DOCKET NUMBER	DOCKET ENTRY
6/20/02	—	Notice of appeal to the UNITED STATES SUPREME COURT by DEFENDANT UNITED STATES, DEFENDANT FEDERAL COMMUNICATION, DEFENDANT INSTITUTE OF MUSEUM. Copies to: JUDGE JOHN P. FULLAM, JUDGE HARVEY BARTLE, III, USCA CHIEF JUDGE EDWARD R. BECKER, and JANET M. LARUE, ANDREA GACKI, LISA M. BORNSTEIN, TIMOTHY ZICK, THEODORE C. HIRT, ANNETTA FOSTER GIVHAN, SCOTT A. COFFINA, KEVIN S. BANKSTON, LEE TIEN, DAVID L. SOBEL, FRANK SCIBILIA, ANDREW L. LEE, STEFANIE S. KRAUS, CHARLES F. SIMMS, MEERA DEO, CHRISTOPHER A. HANSEN, STEFAN PRESSER, ANN ELIZABETH BEESON, Certificate of Service. (See case 01-1303, paper #80) (mld) [Entry date 06/20/02] [Edit date 06/20/02]

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 01-1303, 01-1322

AMERICAN LIBRARY ASSOCIATION, ET AL, PLAINTIFFS

v.

UNITED STATES, ET AL, DEFENDANTS

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE EDWARD R. BECKER
BEFORE THE HONORABLE JOHN P. FULLAM
BEFORE THE HONORABLE HARVEY R. BARTLE
UNITED STATES DISTRICT JUDGES

TRIAL TRANSCRIPT EXCERPTS

[TESTIMONY OF C. MORGAN]

[March 25, 2002]
[pp. 9-50]

* * * * *

Q How large is the Fort Vancouver Regional Library System?

A We're located in Southwest Washington, directly across the Columbia River from Portland, Oregon. We cover 4,200 square miles, which spans the Cascade Mountains. We serve 12 cities, three counties, the unin-

corporated areas of three counties, and we serve 372,000 people.

Q Okay. And how many library cards are issued by the system?

A 238,000 registered borrowers.

Q What resources does the system provide to those patrons?

A We provide access to over 700,000 materials of books, periodicals, videos, pamphlets, documents. We provide reference service, both at—at all of our branches and on the bookmobiles, and a backup reference service from our district headquarters.

We provide internet service, word processing, CD ROM base story stations for young children, programming for all ages, electronic databases that feature over 2,000 magazines, full text, as well as a number of encyclopedias and specialized reference books.

We provide, I think I said programming for all ages, and we provide a various number of outreach services.

Q Ms. Morgan, I think you're going to need to slow down a little bit.

A All right. Sorry, yes.

Q Now, does the library system have a mission statement?

JUDGE BECKER: I think she's talking just fine.

MR. SMITH: I was worried about the court reporter, not Your Honor.

JUDGE BECKER: She talks with celerity and clarity.

JUDGE BARTLE: This is a sound recording system.

MR. SMITH: Okay. Thank you.

BY MR. SMITH:

Q Does the library system have a mission statement?

A Yes, we do.

Q And can you briefly summarize what the mission is of the library?

A Yes. The mission of the Fort Vancouver Regional Library District has two major themes. First is the library will provide a diverse and unbiased source of information for all the individuals it serves, and secondly that it will protect the rights of each individual to make his or her own choice about what materials, information, or services to access.

Q And I believe that you have in front of you three of our exhibits, Ms. Morgan. Can you refer to plaintiffs' Exhibit 61 which is our volume 3 of the plaintiffs' exhibits?

And is the mission statement on page two of this composite Exhibit 61?

A Yes, it is. Yes, it is.

Q Now, does the library system have a policy on selection or collection of materials in the library's collection?

A Yes, we do.

Q And is that on page 83 of the same exhibit, referring to the numbers that are CM000083?

A Yes, it is.

Q And can you briefly—

JUDGE BECKER: What page is it?

MR. SMITH: 83.

JUDGE BECKER: 83, I'm sorry.

BY MR. SMITH:

Q Can you summarize for us the basic policies of collection developments of the system?

A Yes. The overall part of the policy mirrors the mission statement in that it says that Fort Vancouver Regional Library will select and maintain the collection that allows each individual to make choices about which materials to select, and that it is an inclusive policy.

Materials will be included based on the anticipated and express needs of the patrons that we serve, and materials will not be excluded solely on the basis of either content or viewpoint.

Q Now, you referred to the anticipated and express needs of the patrons. Can you tell us how you anticipate the needs of your patrons?

A Yes. We have our selectors, most of them, actually work on the public service floor, so they become very familiar with the types of questions that

patrons are asking and the types of materials that they are checking out.

We have patron comment sheets in each of our libraries, oftentimes comments about the collection appear on there. We have a pamphlet that asks people to let us know what they would like to see in their library in which they can do a broader coverage in relationship to that.

We have youth statistics that are both based on types of materials. Our collection is automated and so we can categorize materials and then tell how often they circulate. Plus individual titles in our automated system also tell us how often they circulate in a year.

So all that information is available to those who are selecting the materials.

Q Now, under your library system's policy, are materials ever excluded because of their controversial content?

A No. In fact, the selection policy specifically addresses that in which it indicates that materials of a controversial nature or that which might be objectionable to some members of our public will be included based on what role they would play in making—in having a diverse collection, with a variety of subjects and diverse viewpoints.

Q Can you give us a couple of examples of some of the more controversial print materials that you have in the collection?

A Well, this book is no longer in the collection because it wore out, but Fort Vancouver Regional Li-

brary purchased Madonna Sex because we had had more previous request for that than any other book in our history, and that certainly was controversial material.

But, the kind of controversial materials we have are much broader than that. We have people who object to young children's books because they are perceived to challenge parental authority, children's books because they deal with themes related to gay families. We have—

JUDGE BECKER: Well, you've had objections to Harry Potter haven't you?

THE WITNESS: Actually, we have not had any objections to Harry Potter. It is one of the most challenged books, but not—we've not had any formal objections to Harry Potter in our system. But we have to Henny Penny because the family were apparently not familiar with folklore and the fact that it would teach children not to trust others.

JUDGE BECKER: What would your library do if a donor had a—prospective donor had a collection of hard core—what we might all agree was hard core pornography and offered to donate that to the Fort Vancouver Regional Library?

THE WITNESS: Well, with due respect, I ask—as a result of numerous discussions with people that use our library, I don't think there is a common definition of what is hard core pornography.

If somebody gave us something that we became aware had been declared legally obscene by a Court, if

that's what you mean by hard core pornography, then we definitely would not add it. Otherwise we would have—we would look at any gift as we would anything that we select, about how it meets the criteria in our selection policy and what the anticipated needs or express needs of our patrons are.

We would not make the decision based on the content, but based on the item as its whole, and its place it might play in the collection.

JUDGE BECKER: Let's assume that the gift depicted kiddy porn, adults or children engaged in—children engaged in—

THE WITNESS: Child pornography—

JUDGE BECKER: —sexual acts or let's assume it was simply a collection of Hustler Magazine.

THE WITNESS: Well, for the first—in the first example you gave, child pornography is illegal and, of course, we would not add it to the collection.

The second example you gave is an interesting one. The library does not subscribe to Hustler, and magazines are in a different category. We don't not subscribe to Hustler because of its content. We don't subscribe to it because, in my knowledge, we've never been requested to subscribe to it. Magazines are—

JUDGE FULLAM: Nobody had the nerve to ask you to possibly.

THE WITNESS: Well, we have a very nervy population, so I'm not sure that that's the case. But we could discuss that, I guess.

The magazines are selected by the branch librarians, not centrally, and we have very limited space for magazines. We are— we're very challenged space-wise in our library district with little funds to be able to do anything about that.

Consequently, to explain this perhaps more succinctly, the only part of our collection that I have not—ever gotten a complaint from a branch library about not having enough money for collection has been the periodicals. They could use many more than what they can actually house, and consequently, we do have Playboy, we do have Cosmopolitan. It seems that the combination of no request and limited space has been the major indicator in that.

So if somebody tried to give us a bunch of Hustlers, I will not second-guess what the branch librarian would say, but I suspect that they would say they don't have room for it.

BY MR. SMITH:

Q Can you give us some other examples of some sexually explicit materials that are in the print collection in the system?

A Yes. We have sex education manuals. We have books on how to enjoy or improve your sex life, like The Joy of Sex and The Joy of Gay Sex. We have literature, poetry, novels with sexual themes.

We have art books with sexual themes. Mable Thorpe's books for an example. And as I mentioned, we have Playboy and Cosmopolitan.

Q And do you, as a matter of policy, limit access to these materials in any way?

A No.

Q Does the library system have a policy, a formal policy on minors' access to materials?

A We do, and it's very long. What the board, library board decided to do was to document the process they went through for about eight months after the controversy erupted about Madonna's Sex book simultaneously with a discussion of the gay sex manuals in our library.

And the board thoroughly examined all aspects of minors' access, held numerous public hearings, heard comments from all over the library district, held hearings in various parts of the library district and came to the conclusion that the policy would be continued that each individual has free and open choice to our collection, that parents or guardians are responsible for how their children use the library.

But the library staff would provide as much help that we can to parents and for them to be able to make those decisions in terms of offering help in selecting materials, doing bibliographies, in any way that we could to help parents carry out that responsibility.

Q And does that policy appear in Exhibit 61 at page 43?

A Yes, it does.

Q Was that policy developed prior to the availability of internet in your library?

A Yes, it was.

Q Do you have inter-library loan services available in the library?

A Yes, we do.

Q Can you just briefly tell us what those are?

A Inter-library loan arrangements are arrangement agreements between libraries that we will lend our materials to other libraries for use of their patrons. It's based on the fact that not every library can have everything, and also that even if every library did have everything, things—or could, things go out of print, they get lost, they wear out.

And so, you may no longer be able to purchase something even if you wished to do so. But some other library may well have it.

Q And what libraries are available as potential places to borrow from?

A Libraries all over the world.

Q How does a patron make a request for those materials?

A We have a form that can be used either to request that we buy or get an inter-library loan so that staff can make the decision about which is the best way to approach that.

Plus, I mentioned our backup reference service that we have. If a reference librarian is working on a question that has been referred and the only way to answer that question is from a book borrowed from

another library, that librarian will initiate an inter-library loan request on behalf of the patron.

Q Are there limits on the content of the materials that you will borrow for a patron through inter-library loans?

A No. And our information to patrons about inter-library loan is that we will attempt to borrow anything the library does not own.

Q Would the library system borrow Hustler Magazine for someone?

A We would—the circumstances with magazines are that most libraries do not lend whole issues of periodicals. But they do photocopy individual articles from magazines.

So we would ask that patron if they had an individual article that they would like to see copied, and if so, then we would initiate, because there are libraries that own Hustler, so in all likelihood, we would be able to fill that request.

Q Does the system have any policy on the confidentiality of patron records?

A Yes, it does.

Q And does that appear on page 28 of Exhibit 61?

A Yes, it does.

JUDGE FULLAM: We'll take your word for it.

BY MR. SMITH:

Q Okay. And can you describe briefly what the policy is?

A And you'll notice it's a two-part, having been confirmed later after the first part. The first part was adopted in 1981, or '75 and then '81. And Fort Vancouver Regional Library follows Washington State laws requirements that we will not release any information that connects a library user with use of the library.

The later confirmation came as we were preparing to automate. We had to get an election to automate, and our patrons expressed great concern about automation having a potential threat to their both privacy and confidentiality because we didn't have library cards before we automated.

Q When you say automation, what are you referring to?

A I mean putting our catalog into computer format. And we didn't have library cards before, so it was a huge jump for us. And they were worried that would collect a lot of information from them, therefore violating their privacy, or reveal it to people other than what we needed for library business, and we assured them we would not.

So we reconfirmed the policy.

Q And do you currently provide internet access to patrons at the library?

A Yes, we do.

Q And when did that begin?

A 1995.

Q And how many terminals are available for patrons to use?

A Sixty.

Q How many are in the main branch?

A Twelve—excuse me, 14.

Q Now, why did the library system decide to provide internet access?

A Well, our mission says that we will serve as a diverse and unbiased source of information, and space and budget limitations affected how well we can do that. We have very, very small branches outside of our major branch, very rural and very isolated.

The internet was viewed by our library board and staff as being finally the way that we could meet this pledge and provide at basically no more budget—not much more budget costs by just purchasing the whole service throughout the library district. So that's why we decided to do that.

Oh, there's another reason, too. Although we used our backup reference service to respond and, we feel, fill most of the information requests of our patrons throughout our district, there were time delays for the referral. And also we took away some choice from the individuals who were asking the questions because we would search for the best answer and send it to them,

we were making decisions for them based on our reference interviews.

Now more people had a choice to be able to do their own searches for information.

Q And does the system receive e-rate and IMLS funding from the Federal Government for those connections?

A Yes, we do.

Q And does that money play a significant role in making this possible?

A The IMLS moneys are the most significant to us. We get over a hundred—we have gotten since—for three years, 1999 through 2000, over $135,000. And what—

JUDGE BARTLE: Is that each year or total?

THE WITNESS: Total.

JUDGE BARTLE: How much again?

THE WITNESS: 135,000.

JUDGE BECKER: And that's a three-year period?

THE WITNESS: Yes, it is.

Now, whereas that may not seem to be an extraordinarily large amount of money, when you operate totally on a property tax and you have a need to upgrade your technology to be able to serve 400,200 square miles, you need an amount of capital outlay to

put right in right now. And that has been difficult for us.

And consequently, the ability to apply for these funds is a way that we've been able to keep out technology up to date and being able to continue to provide this very important service to our patrons.

JUDGE BECKER: Your board is a public board, I take it.

THE WITNESS: Yes, it is.

JUDGE BECKER: How is a board selected?

THE WITNESS: We have seven board members. They are appointed by the elected county commissioners. There's one each in the two more rural counties, and the rest of them come from Clark County, the most populous county.

JUDGE BARTLE: What is your total library budget for each year?

THE WITNESS: Fourteen million, approximately.

JUDGE BARTLE: That's for each year?

THE WITNESS: Yes, it is.

JUDGE BECKER: So you're getting $40,000 a year out of 14 million?

THE WITNESS: Yes, as I said.

Also we have the e-rates, we get e-rates, and we have about $6,500 for internet service providers, and another 53,000 for telecommunications of which about

25,000 is for frame relay, which is the basic backbone of our providing our electronic services.

JUDGE BECKER: Now is that a fund or is that the discount, isn't it, the e-rate?

THE WITNESS: Yes, it is.

JUDGE BECKER: So that what you're identifying is what you save as a result of the e-rate discount?

THE WITNESS: Yes. Thank you, yes.

JUDGE BARTLE: So what's the total savings and amount of money actually received from you? Is that the 130 you're talking?

THE WITNESS: All right. Well, there are two different kinds of funds involved. And the first amount of fund that I discussed was the LSEA grants. And those don't come automatically, you apply for them through the state library.

So we have applied for three—for a total of four grants over three years, 1999 to 2001. And those grants specifically for helping us to provide the internet service.

JUDGE BARTLE: And how much was that?

THE WITNESS: They totaled—oh, it was 135,000 plus.

JUDGE BARTLE: So that's the 135,000—

THE WITNESS: Right.

JUDGE BARTLE: —over three years?

THE WITNESS: That is correct.

JUDGE BARTLE: All right. Now, what else did you receive in the way of discounts or subsidies?

THE WITNESS: All right. That's the e-rate funds that we spoke of.

JUDGE BARTLE: Right.

THE WITNESS: And we received $6,500 for, discount again, for our internet service provider fees.

JUDGE BARTLE: That's for a single year or for over three years?

THE WITNESS: Yes—no, that's a single, each year.

JUDGE BARTLE: Okay. So that's roughly 19,500.

THE WITNESS: That's right.

JUDGE BARTLE: Over that same three-year period, and that's in terms of discounts?

THE WITNESS: That's right.

JUDGE BARTLE: So the total then for the three-year period is roughly $155,000.

THE WITNESS: That is correct. As we understand how the e-rate will be applied by the Federal Communications Commission, no part of what they call their telecommunications budget will be covered. And that, of course, since this hasn't happened yet, it hasn't really— in fact, we're not certain—but of that, 53,000 in addition to everything I've told you before that we get from e-rate, about half of that goes for frame relay

service, the primary purpose of which is to provide internet service.

JUDGE BARTLE: So what the plaintiff is saying is that if this library—regional library doesn't participate under the statutes, they would lose, in effect, $155,000 over a three-year period, or would.

MR. SMITH: True in this example, yes, Your Honor.

JUDGE BARTLE: Yes, this example.

MR. SMITH: I think the evidence is going to show that there's quite a variation in the amounts from library to library.

JUDGE BARTLE: Oh, I understand that. But in this case.

THE WITNESS: That is correct.

BY MR. SMITH:

Q Now, you have an internet use policy that you developed at the library?

A Yes, we do.

Q And is that on page 13 of Exhibit 61?

A Yes, it is. We call it a policy on access to electronic information because it covers access to our electronic resources as well as to the worldwide web.

Q And can you just briefly summarize the policy that you developed when you began providing internet services?

A Yes.

JUDGE BARTLE: Now are you talking about the CM number now or are you—

MR. SMITH: Yes, sir. Yes, Your Honor.

JUDGE FULLAM: So it's CM16.

MR. SMITH: I've been talking about the CM number throughout.

JUDGE BARTLE: Right. So you come back, now CM16?

MR. SMITH: 13, I believe.

JUDGE BARTLE: 13, all right.

MR. SMITH: I apologize if I misspoke.

JUDGE BARTLE: That's all right.

THE WITNESS: The policy starts out with a statement that the advent of electronic resources does not change the library board's policy in relationship to free, open, and equal access to information, as is mirrored throughout all of our policy.

It states that filtering will be mandated on no one, but that choices will be offered about how people search the internet. It states that parents and guardians continue to be responsible for their children's use of this library service. It indicates that the library will search for technological means to assist parents in being able to exercise that responsibility.

It states also that the patron, the internet searcher is responsible for not using the library's resources, electronic resources, as with all other resources to access illegal material or to use the service in any way that is illegal, like hacking or copyright violations, et cetera.

BY MR. SMITH:

Q Okay. And do you, in fact, make available internet blocking software or filtering software as an option for patrons?

A Yes, we do.

Q Okay. Let me just ask you quickly to look at Exhibit 62. Is this the document that you make available to patrons to discuss that option?

A 62?

Q Exhibit 62 would be—not page 62, the next exhibit, which would be the next folder, Ms. Morgan.

A Oh, I'm sorry. Oh, Exhibit 62.

Q Yes.

A This is a description of—we get many, many questions. Obviously, this is much too much to expect a library patron to read as they're anxiously trying to register for the internet, so that our staff informs the patron of what the policy is and how they can sign up for the policy.

Q Okay. And can you explain to us mechanically how this choice of filtering works in the library?

A Yes. It's based on a library card and the PIN number, which is the means of additionally protecting the confidentiality of that library card number. And a patron who wishes to use the internet registers one time and they enter their library card and their PIN number.

They select at that point whether they want to search with a filtered or unfiltered desk top. They can password that choice. If they password it, they only know the password. There is no way that staff can get access to that so that no one can change that default.

In addition, we say, as we do with all of our resources, that a parent that gets their child's library card, can also come into the library one time, make that choice for their child, password it, not tell their child what the password is, which means it cannot be changed.

Then, when you are ready to search the internet after you've reserved a terminal, you log-in with your library card and the password, the PIN, and it knows, the computer then brings up the desk top filtered or unfiltered.

Now, there is an additional choice that parents can exercise. They can choose no internet access also, which means should a child try to log-in in using their bar code and their PIN, they would be blocked, they could not use the internet at all.

Q And the third option, of course, is no filtering at all, is that right?

A Filtered or unfiltered, yes.

Q Okay. And how did you arrive as a system at the decision to make blocking software available as an option?

A Well, we began internet service in 1995 and we started with saying that our current policies in terms of access would apply while the board and staff studied what the issues would be in relationship to the internet. We didn't want to jump to judgment

They then held a series of several public hearings, elicited comments via e-mail, fax, in person, in writing from the public concerning how they would handle the internet. As with every single one of Fort Vancouver Regional Library District's public processes, there is a great diversity of opinion, no clear majority, as well as, always a few more people that will speak out in terms of no restrictions at all.

But our board then went back to the missions statement where it indicated that individuals should have a choice and they directed us to figure out how to do that. We started with having filtered search engines available that are generally available on the web as we searched for software that would give us the opportunity. And we actually had the software we use developed just for us.

We had purchased internet management software for time limits because that's our biggest problem, the time limits. And we asked that company to develop a process by which we could offer the options that I just mentioned. So they developed it for us specifically.

JUDGE BECKER: By time limits, you mean limiting the library patron's internet access to a half hour or what —

THE WITNESS: An hour a day is what we do.

BY MR. SMITH:

Q And why is that your biggest problem?

A Well, because of space limitations, we have not enough terminals, and the patrons fight with staff and with each other about whether it's whose turn on the internet or whether they have exceeded their time limits.

The time limits work automatically and shut down, but people have very creative reasons why that shouldn't have happened to them.

Q Can you tell us what categories of web sites are blocked if the patron chooses to use the filtered option?

A We use Web Sense, and Web Sense offers the option of over 50 categories. We have chosen 14 that reflect what we heard during the hearings about people who said I would like my children not to have access to, or I myself would not like to have access to.

So there are a variety of adult sexual, nudity, violence, gambling, illegal activity, hacking, hate groups, that's sort of the nature of what are involved in those categories.

Q And can you tell us how many people have chosen each of the three options?

A Yes. This has been pretty consistent throughout —from when we started it. Eighty percent have chosen unfiltered, 19.9 percent have chosen filtered, and .1 percent currently have chosen no internet access.

JUDGE BECKER: Does this include parents choosing for their children?

THE WITNESS: We assume. This is a self — people register and we don't ask who they are or who they're registering for as long as they have the library card.

JUDGE BECKER: Do the children get their own PIN?

THE WITNESS: The PIN is a default of the last four digits of their phone number, although a patron can change their PIN themselves in any online catalog.

BY MR. SMITH:

Q Now, is it possible for a parent to make a choice that the minor can't change?

A Yes. The parent needs only to password it and not to tell the child, and even a lot of persuasion to staff wouldn't work because we don't—we don't see that password, it's hidden.

JUDGE FULLAM: Does the child get a library card, or could a child get a library card without his parents knowing?

THE WITNESS: Yes. Fort Vancouver Regional Library does not require a parental signature to get a library card.

JUDGE FULLAM: So this 80 percent who chose unfiltered, do you have any notion of how many are children and how many are not?

THE WITNESS: We don't. Age is optional in our patron record because one of the things we heard when we automated about privacy was you aren't going to make us give you our age, are you? We have it there as an option so that we can apply for grants that say how many kids you choose, and I explode the figures based on the percentage, but we have no way to know.

BY MR. SMITH:

Q Okay. Now, why would somebody choose the option of having no internet access at all?

A Well, of course, we haven't interviewed, or I haven't interviewed everyone, but I have at least one anecdotal example.

In one of our branches, a family came in and said that—they thanked us for having that option, even though they knew it probably was not heavily used, because they have internet in their home and their family rules are that the children can only use the internet in their home.

Q Do you have any rules that would prevent people from using the internet to access e-mail or games, things of that sort?

A No.

Q Okay. Can you tell us what efforts you make to protect the privacy of patrons using the internet?

A Well, again, because we've heard continuously from our patrons about the importance of that, we use a combination of—well, right now we're using almost entirely what are called recessed monitors. What that means is the monitor is below the level of the table. So it's pretty hard to see what somebody is searching with that setup.

We also have used terminal placement and privacy screens.

Q What's a privacy screen?

A A privacy screen fits over the monitor and makes —the only place you can see the screen is directly in front of it. You can't see from the sides.

Q Okay. Do you also have rules on protecting the privacy of lists of sites that people have gone to?

A Yes. We don't keep them. What happens after you've completed your search session, everything shuts down whether you're ready to have it shut down or not. And the cache and the history is erased, so there's no more record and no possibility that anything will remain when the next person comes, which protects the person from being inadvertently exposed to something the person has seen before.

The sign-up—the fact that you have used the internet connected to—or the library card record of having used the internet remains till the end of the business day because that's the way we track the time. Our patrons will go from branch to branch otherwise.

And we—at that point, the log is automatically erased and it starts anew. All of the timing is reset for the next day.

Q Does the system suggest web sites the patrons might want to access?

A We have a home page, and on that home page our reference librarians and our librarians and our children's and young adult coordinators have selected sites that we know from our experience are in the most demand. This is a place where we can also point to local resources, chambers of commerce, local organizations in a way that we can't with any of our other resources.

We have a teen page, a kids' page, and a variety of subject pages.

JUDGE BECKER: Do you recommend a particular search engine, or do you just—

THE WITNESS: We have a portion where you do internet search and we have a whole range of search engines. And we have carefully selected ones—we have some that are filtered, we have some Christian search engines, we have a Jewish search engine. We have family friendly search engines.

We've tried to reflect, again, the needs expressed by our patrons. Some of them go to only certain sites, some of them filter from their site. There is no default search engine. You choose when you're searching from our home page.

BY MR. SMITH:

Q Now, the internet policy that you've been describing, do you see that as consistent with the collection development policy on the print collection that you described before?

A Yes, it is. When we select things for the collection, they are selected, processed, cataloged, and after they're checked ~~out they're~~ returned to the shelf. So they remain in the library and we apply the criteria and the diversity, unbiased, et cetera that we talked about before.

When we select the internet, it's more like selecting a service in that we select it for what it provides, not the individual site. There's no way that we can select the individual site. But we do not—as with the print collection, we do not exclude anything on the basis of its controversial nature or its viewpoint or its content, and on the internet we don't also.

Q Now, you mentioned before that there were rules against patrons accessing illegal speech on the internet. How do you go about enforcing that rule?

A The policy specifically states that it is the patron's responsibility, similar to not violating copyright or using any of our materials in the regular collection in an illegal manner, that we provide the information, the patron is responsible for behavior.

The presumption is that they will follow that rule. It would be next to impossible for our staff to monitor that, given the recessed monitors. And we're a very,

very busy library. Even our small libraries are. We have barely enough staff to provide public service.

So, in addition to that, particularly in relationship to obscenity, our staff don't have the knowledge to serve as if they were judge or jury in making those decisions.

Q And if it came to your attention that a patron was disobeying the law accessing something that was clearly illegal, what would the response be?

A If it was—if we knew it was clearly illegal and it came to our attention, then they would be breaking our rules of conduct and we would ask them to stop. If they refused to stop, we would have to call the police because in addition to breaking the rule about illegal materials, the patron would be not cooperating with staff, and that, as I said, would have to result in some action.

Q And have you had occasions where patrons have complained to the librarians about other patrons viewing sexually explicit web sites?

A We have. It's not a whole lot, but yes, we have.

Q And have you also had some issues with behavior of patrons connected or viewing sexually explicit sites?

A We have. Again, in the context of the total number of behavior problems that we have in the library, it is minuscule.

Q Now, I'm going to ask you to get Exhibit 63 out.

A Okay.

JUDGE BECKER: You mean in terms of other behavior problems, loud noise and food and that kind of thing?

THE WITNESS: Well, loud noise, and actually we have more sort of sexually related incidents in the library that are totally unrelated to the internet than for the internet.

We're a public place. We're a public building. And when you have that and it's a come-one, come-all, can't exclude except on the basis of behavior, it happens.

JUDGE BECKER: What is the largest city in the Fort Vancouver Regional Library District?

THE WITNESS: It is the City of Vancouver, and it's the fourth largest city in Vancouver.

JUDGE BECKER: You mean Oregon? You're Washington, not Oregon.

THE WITNESS: No, in Washington.

JUDGE BECKER: In Washington.

THE WITNESS: Yes, yes, right, in Washington.

JUDGE BECKER: What's the population of Vancouver?

THE WITNESS: Oh, it's a couple hundred thousand.

JUDGE BECKER: Is the rest of the district rural, urban—suburban, rural?

THE WITNESS: There's some suburban, but most of it is very rural.

To kind of give you an idea, most people of heard of Mount Saint Helens, the southern flanks of Mount Saint Helens are in our library district. The Columbia River scenic gorge, the entire Oregon side—excuse me, Washington side of the scenic area is in Fort Vancouver Regional Library District. Mount Adams also is in the—the southern flanks are in Fort Vancouver Regional Library District.

JUDGE BECKER: And it goes Pacific Ocean on the west or—

THE WITNESS: No. Vancouver is the furthest west of the cities. And it goes across the crest of the Cascade.

BY MR. SMITH:

Q Exhibit 63, this is a chart you prepared?

A Yes, it is.

Q And I wonder—first of all, it says Incident Reports, 1995 through October 18th, 2001. Is that correct?

A No. Let me explain a little bit about this chart. I prepared it on the plane before I was being deposed just to give myself a context. At that time that was the date.

I revised it to include up through 2000, and so I forgot about the headings.

Q So it actually covers through the end of 2001?

A It does. It does.

JUDGE FULLAM: To the end of 2001?

THE WITNESS: Yes, it does.

BY MR. SMITH:

Q Okay. And if you could just explain to us each of the horizontal lines and what those figures represent, I take it the columns represent the years. But what is the total report, what do you mean by reports?

A We ask our staff to fill out what we call an incident report anytime anything unusual happens in the library. We do this both so that administration will be alerted, and also we use it when patterns develop to indicate that perhaps we need to address a problem that is more than just isolated.

So what we have here are a category of issues that are related to the subjects we're discussing, and the percentage they represent of the total reports received that year.

Q Okay. And the next line down then, it says Materials Displays, what are those figures?

A That is when a patron complains to staff about the regular collection materials, the books, periodicals, et cetera. We also have display areas that are available for use by the public, and sometimes patrons complain about the content of those displays.

So that's what falls—this does not include formal complaints about library materials that come in written into our appeal process.

Q Okay. Now, the next line says Internet Materials, number percent. What is that about?

A That's about—the question you asked me just previous to introducing this, and that is when people complain about what other people are searching on the internet.

Q Okay. So on average how many complaints like that do you get a year?

A Ten a year. Out of a total of—average of 399 a year of incident reports totally.

Q Okay. And the third row is Other Internet. What is that?

A Well, most of this has to do with time limits, or this fellow here came and took my reservation time. "Your system doesn't work at all well and cut me off before my time and you should give me more time."

Q And the last two rows have to do with sexually related behavior?

A Right. And I broadly defined this to include the leaving of printouts in a public place and that's what this means.

Q Okay. So the internet—

JUDGE BECKER: Would you explain that a little more. I'm not quite sure I understand the—

THE WITNESS: Well, somebody may print something off the internet that has sexual content, and leave it someplace in the library where somebody else can find it.

JUDGE BECKER: I see.

THE WITNESS: So the patron who finds it—

THE COURT: So, if they take it themselves there would be an incident?

THE WITNESS: No, not, the issue is—I was kind of using the—we kind of used the guidelines of what somebody might feel harassed, and finding you find objectionable feels harassing and the person should take their own printouts home, not leave them some place.

JUDGF BECKER: So, what happens if somebody leaves them, somebody is offended and then they go to the librarian and they—

THE WITNESS: Yes, that's correct.

JUDGE BECKER: And that becomes an incident—

THE WITNESS: That becomes an incident—

JUDGE BECKER: —report?

THE WITNESS: —which we average two a year.

BY MR. SMITH:

Q It would show up in the box second to the bottom row here—

A Yes, that's right.

Q —because it internet related.

A Yes.

Q What other kinds of behaviors sexually related behaviors have you had that are internet related?

A Well, we have had one case of a patron masturbating, and we have had a couple of cases of inappropriate remarks made to someone while someone is searching the internet. Maybe to the person next to them or something like that.

Q And the bottom row, what is that?

A Oh, that's—those are things with some sexual content that are not internet related.

This has to do again with inappropriate comments with showing other materials to someone who doesn't want to see them that has some sexual content. To asking staff for dates, to well, we did have a stalker on one of our staff That's the number in—I think—we think we had a case like that in 1998, I'm not sure but we've had a number of incidence like that. Well, not a number, but we've had a few incidents like that.

JUDGE FULLAM: Excuse me, but I—

THE WITNESS: Somebody kissing somebody who didn't want to be kissed. That happened once.

JUDGE FULLAM: —this report says you had a total of 399 incidents in 2001.

THE WITNESS: That's the average.

JUDGE FULLAM: And you got —

THE WITNESS: I'm sorry, yes, 399.

JUDGE FULLAM: —62 specific types, what are the other incidents?

THE WITNESS: The other incidents are dogs left in the parking lot automobiles vandalized.

JUDGE FULLAM: Unrelated to the internet.

THE WITNESS: Not related to the internet at all.

JUDGE FULLAM: Okay.

BY MR. SMITH:

Q Not related to sexual behavior—

A No, they—

Q —of any sort?

A —mostly have to do with managing 12 public buildings and three book mobiles.

Q Okay. Can you give us in the chronology, when in this five years span or six years span did you introduce the recess monitors?

A Late in 1999.

Q And what kind of impact did that have on the volume of complaints from patrons about other patrons we surfing activities

A Well, simultaneously, as we added terminals which we added quite a few in 99 we got more and more internet users, but as you will notice the internet material complaints have not gone up.

In fact, they actually reduced from in 1999 it was like in September that we started putting them in, and it was down again to seven in 2000. It was up again to ten in 2001 but our number of internet users had increased from—significantly.

Q Now, do you consider the overall policies that you described that are in place at the Fort Vancouver system to be a success?

A Yes, we average about two, 2200 search internet session a week, open 540 hours. For this number of incidents that we have had plus generally very positive comments that we've received from patrons about the wondrous things that they have found on the internet. The thanks we get for offering choices and how to search. Yes, we feel it has been a success.

Q And has the system made a decision yet about whether it would come into compliance with the Children's Internet Protection Act if that question is ultimately posed to it?

A No, we have not made that decision. We have been following the FCC's guidelines for taking actions and considering the issue.

Q Now, do you have concerns about the Children's Internet Protection Act?

A I do.

Q And can you tell the Court what concerns you have about the requirements of that statute?

A Fort Vancouver Regional Library has a long history of serving—of dealing with it's—the juxta—

position of serving the community being supported by the community and being an institution that is a public forum and needs to protect individual liberties.

We carry that out by study of the legal principles, and by a public process. We have had multiple public processes, and each time that we reach an approach to handling this juxtaposition this tension, we have reached it with consultation with the community.

As I mentioned we had to go out and buy our own software to reach the conclusion that we found from the community with electronic access. This Children's Internet Protection Act would impose upon us a congressional choice which is contrary to that.

Furthermore, since filters are not—there is no filter that can block out only constitutionally protected speech—

Q Unprotected speech.

A —I'm sorry, yes. Constitutionally—

JUDGE BARTLE: You would find a filter that could—

THE WITNESS: —yes, you're right about that.

JUDGE BARTLE: —eliminate all constitutions?

THE WITNESS: Slip of the tongue I apologize.

Yes, you cannot find a filter that wil only filter out unconstitutional speech and so for the first time in Forty Vancouver Regional Library's history we'd be in a position of restricting access to some constitutionally protected materials by us.

We would be mandated—we would be doing that by installing the filters and making them mandatory and it would be on our entire population adults children and staff.

BY MR. SMITH:

Q Okay. Now, the statute would allow you to disable the filter for adults who came to you and said I have a legitimate reason to want access on a unfiltered basis, can you tell us why that doesn't alleviate your concern?

A Yes, I asked my staff what they would expect from me should we do this, and they indicated as they have in all cases that of course I would provide them with guidelines that would make it clear about when they were disabled.

I have been unable to find a definition of bona fide research and even the definition of legal is a little difficulty when you're dealing with what's legally obscene and not.

Consequently I'm not sure how we could provide equitable provision of the disabling. In addition to that, you can disable only for adults. I recently hired a women who had been working for years in a school media center in one of our communities who as a part of her interview told us that the students are frequently blocked from—

MR. ZICK: Objection to that, Your Honor, move to strike. It's hearsay.

JUDGE BECKER: It certainly is.

THE WITNESS: Okay.

So we have concern that constitutionally protected speech would be blocked, and that we would have no way to determine the basis by which we would disable.

We've actually just—the law does not require disabling, it only says may so we would have to decide whether we felt we could provide adequate guidelines in order to do that.

BY MR. SMITH:

Q And is it your view that patrons would exercise the option of asking for disabling?

MR. ZICK: Objection, calls for speculation.

JUDGE BECKER: What was the question?

MR. SMITH: I asked her if it was her view that patrons would exercise the option based on her experience with patrons over 37 years. Your Honor, it seems to me a question that she could answer.

JUDGE BECKER: Overruled, you may answer.

THE WITNESS: I must say however, that it's hard to speculate because we've never put our patrons in a position—

THE COURT: Okay. We'll sustain the objection. She sustained it.

THE WITNESS: Yes, well, let me explain why. I think my explanation is important.

That is that we have never out our patrons where they have to ask to have access. If they ask us to buy a book we buy it almost always buy it. If they ask us for an electronic research we'll give it consideration.

Consequently they have not been put in that position before, so I'm not sure how they would act.

BY MR. SMITH:

Q Would it be logistically possible with the system that you have in place to set up a system where patrons could ask for disabling on an anonymous basis?

A I think it would be totally unfunctional because as I mentioned before our patrons are incredibly creative about how they can get around that hour and if they could. You would have to ask for disabling based on when you came up against something that you thought you should have access to and that would mean that you would have to be identified because your library card is already there.

In addition to that one of the—

JUDGE BECKER: If you keep these other things confidential why wouldn't you keep that confidential?

THE WITNESS: But his question was whether we could have it be anonymous.

BY MR. SMITH:

Q In other words—

A We couldn't have it be anonymous. Yes, of course we would keep it confidential, although certainly having

to get up in the middle of the search session and go find a library staff member—

JUDGE BECKER: So, the problem would be they have limited time —

THE WITNESS: Yes.

JUDGE BECKER: —and it would take them maybe ten 15 minutes to out of their—

THE WITNESS: Right.

THE COURT: —time.

THE WITNESS: Right, one of the reasons it was a minor reason, but one of the reasons why we thought the advanced registration for desk top was an important aspect is that everything we did that slowed down the logging in took away time from the patron and we got complaints about that. In addition to that this would—could be fairly staff intensive depending upon how many times people might ask for it.

JUDGE FULLAM: May I ask, is the limitation on the number of terminals based on the amount of space in the building or the cost of the additional stations or what?

THE WITNESS: The amount of space in the building, we've always been able to successfully get an LSCA grant when we've needed more computers.

MR. SMITH: Your Honor, I have no further questions, I would move the admission of Exhibit 61, 62 and 63?

JUDGE BECKER: Any objection?

MR. ZICK: No objection, Your Honor.

JUDGE BECKER: They're received.

(Plaintiffs' Exhibits 61, 62 and 63 are received in evidence.)

MR. SMITH: No further questions.

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[TESTIMONY OF G. COOPER]

[March 25, 2002]

[pp. 85-140]

* * * * *

A We have 17 branches and a central library in downtown Portland.

Q How many people have library cards to use the services of the library?

A The last time we purged our records we were at about 82 percent of the people who live in that county having library cards in Multnomah County.

JUDGE BECKER: Wow, that's a lot.

THE WITNESS: Yes.

JUDGE BECKER: Is that a record, I mean—

THE WITNESS: In Boston, I'm told, it's 109 percent of their population, but I don't think they've purged their records very recently.

JUDGE BECKER: That doesn't tell you anything about the elections up there, does it?

JUDGE FULLAM: Do you have any notion of how many people actually use the library? I mean—

THE WITNESS: We do. We purge our records about every 18 months. So if you don't use the library within about a year and a half, we no longer have a card on our books for you.

We have some other measures as well. We're one of the busiest libraries in the country. Last year we checked out about 14 million books and other library materials, that's 21 for every man, woman and child who lives in Multnomah County in one year.

JUDGE FULLAM: And how many of those books were actually read?

THE WITNESS: I'm sure all of them.

JUDGE BARTLE: You don't have to answer that.

BY MR. HANSEN:

Q Now, how long have you been director in Multnomah County?

A I've been there for 12 years, always as director.

Q And how have things changed since you've begun your job?

A Things have changed enormously in that 12 years. We—our central library was built in 1913 and we moved out of it for four years, three years for a com-

plete renovation of that building. We reopened it about five years ago.

We have renovated or replaced every one of the branches, and we opened our first two new libraries in 30 years just last year as a matter of fact. The services we provided changed. When I came 12 years ago, we didn't do nearly as much with very very young children as we do now. Now we have children as young as six to eight months coming to book babies with their parents to learn how to use books with very young children.

Our work with schools has changed tremendously in that time, and, of course, technology has made a big impact on what we do and how we serve people.

Q The renovation in the main library and the opening of the new branches, how did you finance those?

A In Oregon we like to vote on everything often and the voters have approved the money in '93 and in '96 for the capital improvements that I described.

In addition, we vote on our operating budget every three to five years, about 55 percent of our budget is determined by that vote.

JUDGE BECKER: We who? Who was the voters?

THE WITNESS: The voters in Multnomah County—

JUDGE BECKER: Really?

THE WITNESS: —and I'm one of them.

JUDGE BECKER: But they vote on the library budget?

THE WITNESS: They vote for a special levy, to allow the library to operate. And that election happens every three years, or by very recent state law, every five years.

JUDGE BECKER: Did you ever hear of that happening in any place else?

THE WITNESS: There are other libraries that get some of their funding from public vote, but in Oregon we vote a lot.

JUDGE BECKER: Okay.

BY MR. HANSEN:

Q What is the governing structure of the library?

A We are a county department. As such, I work for the board of county commissioners. I report directly to the county chair. She is elected from the county as a whole. The other four members of that board are elected from districts, they are the legislative group that—policy making group for the library and she is the—it's a she at this moment, the county chair is the top administrator and she's my direct boss.

There's also a library board. In the case of Multnomah County the library board is advisory, and their role is to be advisory to me and to the board of county commissioners on any matters relating to the library. Those 15 are appointed by the chair and confirmed by her colleagues on the board of county commissioners.

Q The board of county commissioners—the members of the board of county commissioners are selected in what way?

A They're elected, four of them, from districts and one, the chair, at large.

Q Is the Multnomah County Public Library a plaintiff in this case?

A Yes, it is.

Q Who made the decision that you would be a plaintiff in this case?

A We were invited to consider being a plaintiff. After considering it on a staff level and much conversation at library board meetings at two or three of the monthly meetings, and then finally a decision made by the board of county commissioners that we would be plaintiffs in this matter.

Q Does the library receive e-rate funding?

A Yes, it does.

Q How much e-rate money does the library receive?

A This year we have about $70,000 for internet access. We've made application for about 100,000 for next year.

Q What is the total budget of the library?

A The library's budget because of the economy changes from day to day it's about 44 million.

Q What is the basic mission of the Multnomah County Public Library?

A Multnomah County Library helps the people who live in our county and others who use the library find

books and other library materials and information that they need for education, recreation, entertainment.

Q Now, when you refer to recreation and entertainment, could you elaborate on that a little?

A Well, we think of ourselves as being an adjunct to formal education and informal education, but in truth a whole lot of what happens at the library is what people find for their hobbies, their own particular interest or what it is that they like to spend their leisure time at. Examples would include some of the videos we have for children and adults that are purely entertainment in nature, for example, and books that would fall into that category too.

Q Can you give a specific example of something that might be a purely recreational part of that collection?

A Faulty Towers, the videos starring John Cleese (ph) are very popular. There's a series called Disc World, which is science fiction, our fantasy series, we have it on cassette and C.D. in spoken form and in books as well. Oh, the novels of Danielle Steele and Nora Roberts, the kinds of materials, the mysteries that people read for their own entertainment are very very popular.

JUDGE BECKER: People don't read our opinions for entertainment.

THE WITNESS: We haven't had that experience.

BY MR. HANSEN:

Q Are the collections contained in each of the branch libraries the same?

A No, the collections at each branch library are somewhat different from one another depending on the population that's served at a particular library.

Q Can you give an example?

A Well, I'll tell you an example that specific to Portland. Unlike other libraries we have more material on roses than almost anybody. Portland is the city of roses. We've had a rose festival for about a hundred years. We have historic materials including a collection that dates from England in the century before the last century, and current materials as well on the subject of roses.

In our branch libraries the collections differ depending on the population that's served So for example, we have two libraries, one with a Russian Orthodox population nearby, a neighborhood nearby, and one with Russian Pentecostal nearby. And we have Russian language materials in those two libraries.

Q Does the library provide any services other than the lending of books and other materials?

A We provide many services in addition to coming in and checking out books, there are other library materials. I mentioned earlier that we do story hours for very very young children, also for toddlers and four-year olds. Preschool programs are very important in the services that we provide.

Of course, we provide information. We help people find the information they want and need in print and in electronic format. We have meeting rooms, we have exhibits, we have guides to help people start small

businesses, for example. An important role that we play is in introducing people who are job seekers, perhaps new to our community or perhaps looking for work outside of our community, and those who are beginning small businesses or would like to find ways to improve them. We have a packet of material, for example, that is available on request that tells you about the city licensing requirements and some of the state requirements for small businesses to comply with.

Q Are children served by that public library?

A Children are a major part of the audience that we serve, yes.

Q And can children get a library card?

A Yes, children can get a library card. We don't give them in utero, bit I've given them the day after birth, so very early.

Q What, are there any restrictions on children getting library cards?

A The only restriction on children getting library cards is for a child under 14, their registration card should be signed by a parent. That registration card that the parent signs explains our policies with regard to access to books and other library materials, and to make sure that the parent has an opportunity to know that we rely on the parent to supervise the child's use of the library.

Q Are there any restrictions on materials that children can access of check out at the library?

A No.

Q Are there constraints in the library setting that prevent you from fully fulfilling your mission?

A There are many. One is that we serve a large and diverse population, and I think every individual has at least one unique library need that's not shared by others. We don't have the money and we don't have the space to meet all the needs that come to us.

Q How do you try and get around that limitation—those limitations?

A Well, there are a variety of ways. Operating a public library is very much a balancing act, trying to figure out the best way to serve our population and actually the best way to spend the tax dollars that come from that local population.

We use a number of different ways to do so, inter-library loan is one. Of course, technology gives us access to more materials and that's yet another way in which we can serve very diverse needs.

Q Did you hear Ms. Morgan describe what the inter-library loan program is?

A Yes.

Q And was that essentially an accurate description?

A Yes. There's a difference in ours in that you can actually make an inter-library loan request without talking to a library staff member. You can fill that out with your library card as the identifying information and do it from home, work or school as well from in a library.

Q Is there any material that—

JUDGE BECKER: You said do it from home, can you do it by e-mail or—

THE WITNESS: That's right, via the internet. We have about a third of our access is remote, in other words, people choose to use the library without walking in our doors.

BY MR. HANSEN:

Q Is there any restriction on materials that the library would attempt to get through inter-library loan based on the content of the materials?

A Not based on the content. There might be differences based on, can we identify that this is a real piece of material, do we have the correct bibliographic or other identifying information.

Q Does the library contain material dealing with the subject of sex?

A Yes, the library has material dealing with the subject of sex.

Q Can you give me an example?

A I'll give you several examples. We have material in the children's library on where babies come from. We have magazine articles, some are on line and some in print. I actually have some examples.

We had a question from a patron about a Cosmopolitan article that identified men's erogenous zones, his secret sexual moan zones, for example. We have material like the pictorial information or images that

would be found in the Mable Thorpe's photographs, for example. We have sex manuals for heterosexual and homosexuals, and we have a number of other specific books to help people's—answer their questions in this area.

Q Does the library carry Playboy Magazine?

A The library does have a subscription to Playboy Magazine, yes.

Q In the—is there such a thing as a card catalog anymore?

A No, there is not. The information about what the library has is on an electronic format, it means you can know what is available in the whole system, not just in a particular library. And, in fact, you can know that from home or work or school via the internet.

Q And if we were to search that database today, would we find books on the subject matter of erotica?

A Yes, that would be one of the subject headings and it would certainly pull up material.

Q Does the library carry R rated movies?

A We have videos and some of them are R rated, yes.

Q Does the library provide patrons with access to the internet?

A Yes, Multnomah County Library does.

Q And why does it do that?

A It does it for a variety of reasons. For one thing, it's part of what our patrons expect. A lot of them know that that's a valuable source of information. We are one of the most wired communities in the nation, but even in our community just under half of the households do not have internet access at home, so we know that that's something that people need and expect us to have.

It also widens what we can provide them with. It has information that might be more current and certainly more extensive than we can provide in print.

Q Do you have any statistics on the amount of terminals you have and the amount of usage on the internet?

A We consider technology both our present way of providing service and the path to our future. More and more of what we do now is available electronically.

We have about 470 computers for—with internet access for the public. And we have about 450 for staff. Some of those are in staff work areas and some are on reference desks or other service desks.

JUDGE BECKER: Are you reducing your budget for hard copy because of internet access?

THE WITNESS: We are not, Your Honor. Although we are finding that in some cases electronic access to a magazine can replace having the hard copy of the magazine and we're very happy to make that switch.

JUDGE BECKER: Okay. You do it for magazines then, rather than books?

THE WITNESS: Right. Although there are some—the universe of what we can buy for books, both because of the cost of having it, of keeping it and of the space for it is different than what we can buy for the internet. Now about just under a third of our budget for books and other library materials is for something other than print on paper. That might be DVDs, it might be databases, it might be CDs.

BY MR. HANSEN:

Q Do you know how many people use the internet at your library?

A We don't have exact numbers, but I know that in the last fiscal year we had 120,000 unique users of internet access at Multnomah County Library.

Q Now, all of the internet—

JUDGE BECKER: Well, what do you mean by unique?

THE WITNESS: It means if you were there and used it twice, we'd only count you once.

JUDGE BECKER: Okay.

BY MR. HANSEN:

Q Are all the terminals at the public library set up the same way?

A The basic setup is the same, they're configured similarly, but different functions are enabled at different computers for different purposes.

Q And would you explain what possible functions are enabled?

A In the library we have what we call resource computers. Those provide access to the library's card catalog—or the library's catalog, now no longer in cards, to the databases to which we subscribe, the library's home pages and various helping aides to help people find the information they want and need. And they are not—and library users are no able to type in a URL or an address for an internet site at those computers.

Then we have a series of computers that have all the things that I've just identified and are used for those purposes, but in addition allow people to use the internet independently of the aides that we provide.

Q Do you also have some computers configured for children?

A Yes, about 20 percent of our publicly accessible computers are configured for children.

Q Would you describe how that works?

A If it's one of the children's computers, then there's a difference in the way that it is used, you have to be child or be an adult accompanying a child, a care giver or a parent in order to be able to use a computer in the children's library at our main library or in any of the computers that are identified as children's computers in the branches.

In addition, when that computer is on, it opens up to the kids' page. And the kids' page is configured to be

able to help children find what they want and need in the internet.

JUDGE BARTLE: At what age do you consider a child to be for these purposes?

THE WITNESS: We actually have children and we have teens, and so it goes up to about the age of 18. The kids' computers and the kids' page generally serve 12 and under.

BY MR. HANSEN:

Q And can a child under the age of 12 use one of the non-kid computers?

A Yes.

Q Would you look at Plaintiffs' Exhibit 102, please.

What is Plaintiffs' Exhibit 102?

A It's a very recent version of our kids' page. I know that it's recent because the material on the right changes and those are upcoming events.

Q And would you explain what this is showing us?

A This shows what you see when you first log-in to a children's computer, this is the kids' page.

Q And what would happen if, for example, I—the blue—I'm sorry, the blue lines, do those represent links that I can click on?

A That's right.

Q What would happen, for example, if I clicked on the homework center line?

A Well, I believe that's the next page in that exhibit. And those also are topics on which you could click to get further to links that have been identified as providing information to help with homework in those specific areas.

Q Sites that have been identified by whom?

A By library staff.

Q Can you explain how that occurs?

A Librarians and library assistants have the responsibility to monitor particular areas and they are responsible for providing the links to those pages.

So, for example, one of the youth librarians in the branches is in charge of home schooling. We have an active home schooling community in Multnomah County and that information—and she's responsible for finding that information and making sure that the links are up to date and current.

Q What's the third page of Exhibit 102?

A That's the Outernet, which is our page for teens or young adults.

Q It's the equivalent of the children's page but for teenagers?

A That's correct.

Q And what are the next few pages of that exhibit?

JUDGE BECKER: Well, I note that on this so-called outernet you have a link to health, sex and your body?

THE WITNESS: Yes, that's correct.

BY MR. HANSEN:

Q What would happen if you clicked on that?

A You would find sites we had identified to provide that information appropriate for those who might be using it.

Q Okay. Now, what are the remaining few pages of that exhibit?

A They are more details of what it is we have linked to the children's page. The first one identifies some search engines that are available and tells you a little bit about each of those search engines, again, to provide a guide for children and for their parents in order to make effective use of the internet.

Q And why do you create all of these pages?

A The internet is a wonderful resource for us and for those who use the library, but I think we're still in the very beginning of the use of this resource and it's very complicated to find your way around the internet. And to get to what you want and need is really the challenge for us and for those who use the library.

We provide a number of pathways or guides to increase the chance that people will actually find what they want rather than find what they're not interested in or waste their time with what's not pertinent to their needs.

Q Okay. Do the pages represented in Exhibit 102 accurately represent the web site that is run by the Multnomah County Public Library?

A Yes.

MR. HANSEN: Your Honor, I offer Exhibit 102.

JUDGE BECKER: Any objection?

MS. GACKI: No objection.

JUDGE BECKER: Received.

(Plaintiffs' Exhibit 102 is received in evidence.)

JUDGE BECKER: Ms. Cooper, is it a fair statement that children are becoming computer literate or adept at accessing the internet at increasingly younger ages?

THE WITNESS: Yes, that's been our experience. For example, for preschoolers we have some games on the internet, on the children's computers, to help kids become ready to read that identify shapes, for example. We have a very popular Cat in the Hat phonic game.

JUDGE BECKER: But preschoolers know how to access the internet?

THE WITNESS: Yes. To access the internet might be going a little far. It's not unusual to see a three-year old with her parent typing something in or clicking a mouse in order to be able to identify something on a screen.

JUDGE BECKER: But how about—I mean the six year olds, seven year olds, eight year olds, they're now using the internet?

THE WITNESS: You know, when you say, using the internet, I don't think anybody even knows that's what they're doing. Some of the resources that are mounted here and linked to the home pages are accessed through the internet. Some of those may reside on, or it may have at sometime have resided on our database in electronic format within our building. So they may be using the internet and not even knowing that they're doing so, and in that case—

JUDGE BECKER: But my question is, three, four years ago was that happening, or is this happening more, the younger children, as time goes on?

THE WITNESS: It is definitely increasing.

BY MR. HANSEN:

Q What is the library's policy with respect to the use of the internet?

A Can you ask that question in a different way?

Q Yes. Does the library provide blocking software?

A We provide library users with the opportunity to choose to have a filtered search, and they make that choice each time they initiate a search that goes out to the internet.

Q What blocking software product do you use?

A We use Foolproof Software.

Q And how does that work?

A Foolproof actually has a vocabulary of words and combination of words, and when a URL is typed in, the

software—and by the way, this software is networked throughout our whole system. It resides on a server and it's throughout our 17 branches and central library in the nearly 100,000 computers for staff and the public that are available in that way. And it will literally in nanoseconds determine whether there are specific words or combinations of words that it deems by the category that we have enabled, we've enabled only the pornography category to be chosen by library users to be filtered, and then let the library user know if that URL or address is to a site that that particular software has determined may be pornographic.

JUDGE BECKER: Two questions. What is a nanosecond and—

THE WITNESS: It's shorter than a second. I think it's—it's actually a tenth of a second.

JUDGE BECKER: And do you have anywhere on here the screen which shows—gives the patron the option to have a filter or not have a filter?

THE WITNESS: I don't think we do.

JUDGE BECKER: Could we access that over lunch and print it out?

THE WITNESS: You could. I did it last week and can describe it for you as well.

JUDGE BARTLE: Does the—

BY MR. HANSEN:

Q Could the—I'm sorry, Your Honor.

JUDGE BARTLE: Does the potential user know the criteria that's being used by the library to filter out, say, pornography?

THE WITNESS: No. We tell people that that's what the filter is set to filter.

JUDGE BARTLE: It's designed to filter out pornography, but the library user doesn't know how you define that.

THE WITNESS: That's exactly right.

JUDGE BARTLE: See, they don't know what the combinations of words are.

THE WITNESS: That's right.

JUDGE FULLAM: And I assume URL means Underwriters Laboratory, does it?

THE WITNESS: No.

JUDGE FULLAM: What does it mean?

THE WITNESS: It's the address of a site, and—

JUDGE BECKER: Uniform Resource Locator.

THE WITNESS: Yes, Uniform Resource Locator. It really means—think of it as the address to get to a particular location on the internet.

JUDGE BARTLE: Who develops the definition of pornography in your library? Do you do it? Does the board of commissioners approve it? How do you determine that?

THE WITNESS: Actually, we've asked the filtering company to use the definition that they've developed.

JUDGE BECKER: So you rely on the filtering company?

THE WITNESS: We asked them to do that.

JUDGE BARTLE: So you just tell them, we want to have a filtering system for pornography and you ask them what the criteria are, and if you're satisfied, when I say, you, is it you the director who decides that or does it have to be approved by the commissioners?

THE WITNESS: Actually, it's a different level than that altogether. We chose this particular product for the blocking software we installed after extensive staff review and review as well by an internet access committee board that participated together with staff in reviewing a variety of products that were available.

JUDGE BECKER: Right. And you might just give us—I'd be interested in seeing that screen, so maybe you could give one of my law clerks the web address and we'll try and print it out over the lunch hour.

MR. HANSEN: We would be happy to do that, Your Honor.

BY MR. HANSEN:

Q You referred earlier to the fact that you enabled the category of pornography and it's triggered by words or a combination of words.

Do you, as the library, know what words or combination of words cause the software to label a page pornography?

A No, we do not.

Q Can you find that out from the blocking software company?

A I do not know.

JUDGE BARTLE: Well, then how do you know whether to accept it or not? I mean they can be screening out things that in the general view may not be pornographic.

THE WITNESS: And I think you're probably right, they well may.

BY MR. HANSEN:

Q Does that, in fact, happen?

A We have had experiences where that's happened. In our case, because it's a choice that the library user can make, they have the opportunity to back out of such a search and begin an unfiltered search.

JUDGE BARTLE: For example, the company can say anytime the word, breast, is mentioned or, testicles or uterus are mentioned, that's pornographic and people may be wanting to find information about breast cancer or testicular cancer, uterine cancer.

THE WITNESS: You've listed some examples and there are many more that happen as well. I can give you a couple of examples of the kinds of things that we are aware of. This filtering—this content blocking

software will identify the word vibrator as one not to be found, but it doesn't include the word, vibrators, with an s on the end. So you can, thus, find information or material through that way.

Sexual dysfunction is not blocked, but through the sites that come up with that search on a filtered station, you have access to pictures of erect and flaccid penises to circumcised and uncircumcised. Foreskin is not blocked. You have access to herbal Viagra to ads about how to add four inches to penis lengths. Excessive masturbation is not blocked, and we've found that you can have access to partygirl.com and other similar sites even with the filter enabled.

MS. GACKI: Your Honors, I'd like to object at this time. Lack of foundation laid for this testimony.

JUDGE BECKER: Do you want to respond, Mr. Hansen?

MR. HANSEN: How is that you know that—I'll do a foundational question, Your Honor.

JUDGE BECKER: All right. Well, we'll reserve the objection.

BY MR. HANSEN:

Q Ms. Cooper, how is it that you know that these problems have existed with respect to the software that you use?

A I asked library staff to report to me in advance of my coming here for this testimony of specific examples of over-blocking and under-blocking of which they were aware.

We had earlier had some examples that were brought to our attention by library users and by other library staff.

Q Have there been instances of over-blocking that you haven't talked about?

A Where something was blocked that we think probably shouldn't have been, one that I found most interesting is that one of the frequent reasons people come into the library to use the internet is to access e-mail. In fact, we've just concluded a series of classes for seniors to—that was actually funded by the library foundation to help them be able to e-mail their grandchildren and family members in distant areas.

Many of them use free e-mail services like Yahoo or Hotmail. And because they are supported by ads and some of the ads that are part of that are for Find Your Perfect Match and other sites that would be blocked by our software access to that e-mail is soft—is blocked, so I think that would be one example.

Q Were there ever any occasions in which any of the sites you had chosen for your kids' page or your teen page were blocked by software you used?

JUDGE BECKER: Well, is this foundation? Well, it seems to me like this is continuing the direct examination.

MR. HANSEN: I'm sorry, Your Honor. I thought that—I thought I had asked the foundational question and it was sufficiently—

JUDGE BECKER: Well, we didn't give Ms. Gacki an opportunity to tell us whether or not she renewed her objection.

MS. GACKI: I would like to renew my objection, yes.

JUDGE BECKER: Ms. Gacki, have in mind we've got a three-judge court in a national case, and if she were able to—I mean you may be technically correct that this—

MS. GACKI: Perhaps I should let it go in this instance.

JUDGE BECKER: —is hearsay. Well, I mean you can bring in these other witnesses or they could be deposed. I mean have in mind that this is a constitutional adjudication and there seems to be, indeed, this material is material that both sides have recognized exists. The question is, what is the legal affect of it.

Well, do you want to —

MS. GACKI: I will withdraw my objection.

JUDGE BECKER: Go ahead, Mr. Hansen.

BY MR. HANSEN:

Q Ms. Cooper, the question pending is that there have been occasions when the blocking software you use has blocked pages that librarians have chosen for the kids' page?

A Yes, that's exactly right. And that has happened for especially the outernet page, but others about specific health related matters, puberty, for example, safe sex information, a variety of sites that we've

identified as being appropriate to provide teens with information they may want and need have been blocked by the software.

Q If I'm a patron and I'm sitting at one of your terminals and I've chosen a blocked usage of the internet, and I find that I am blocked by something, what, if anything, can I do?

A You have the choice —

MS. GACKI: Objection. Foundation?

JUDGE BECKER: Overruled.

THE WITNESS: You have the choice of changing your choice. In other words, you can back out of the option to have a blocked or filtered search, and have an unfiltered or unblocked search.

BY MR. HANSEN:

Q I would like you to look at Plaintiffs' Exhibit 103 and 104.

Could you describe what those are, please?

A 103 is the parent's guide to Multnomah County Library which includes electronic resources. And 104 is all our policy on acceptable use of the internet.

JUDGE BECKER: Incidently, Ms. Cooper, this seems to assume, at least some of Ms. Morgan's testimony, seems to assume that there's always a parent. There isn't always a parent, is there?

THE WITNESS: No, and in fact that's part of what's covered in the Exhibit 103. We, and in a library card

registration form that I referred to earlier, we really remind parents that we are a public place, and that when their children come there, whether they're with them or not, their behavior is not something that we'll try to identify or modify as regards what we'd need to know to have particular knowledge of that family's values and that child's maturity.

JUDGE FULLAM: What do you do in a case of a kid that has no parents? Do you take the word of a guardian or a care giver?

THE WITNESS: Yes, that's right, whoever it is that's empowered to act as the care giver for that child.

So for example, it might be a teacher in the case of a class that comes to visit the library who says, we're going to show our sixth graders how to access the internet, but I want all of them to use a content blocking software and they are all instructed to do so in that case.

BY MR. HANSEN:

Q What is the purpose of the library producing Plaintiffs' Exhibit 103 and 104?

JUDGE BARTLE: I think that's for you to decide. She doesn't know what the purpose of it—why—

BY MR. HANSEN:

Q What is the purpose of the library producing—

JUDGE BARTLE: Oh, you mean preparing it?

MR. HANSEN: That is precisely what I mean, Your Honor.

JUDGE BARTLE: All right.

BY MR. HANSEN:

Q Are Plaintiffs' Exhibits 103 and 10—who is the author of Plaintiffs' Exhibits 103 and 104?

A Library staff are.

Q And why did the library create these documents?

A Again, we found the internet to be a wonderful resource, but not a perfect one. And just as we provide health and guide for people and how to use our print collections, we provide that same kind of help and guidance in how to use our electronic resources.

Q And are these pamphlets available to patrons at the library?

A Yes, and in fact new cardholders are routinely given these as well as other information on materials about use at the library.

Q Do they accurately describe the library's policies with respect to internet usage?

A Yes, with the caveat that our policies continually are refined and changed. So for example, we now provide word processing on internet computers, and I don't think we did that at the time we did the last printing of the acceptable use of the internet. So there are some things that would be modifications and changes.

MR. HANSEN: Your Honors, I offer Plaintiffs' Exhibit 103 and 104 into evidence.

JUDGE BECKER: Any objection?

MS. GACKI: No objection.

BY MR. HANSEN:

Q Ms. Cooper, how did the library come to the policy choices it made with respect to the internet?

A Oh, a variety of ways. What's available in technology at any given time, that's part of the reason for now being able to provide the word processing. There are staff groups that make recommendations. We certainly hear from the public on a regular basis in a variety of ways. The library board has an internet access committee that has met for several different series of major decisions that we have made in this area.

Q Is confidentiality an important part of the library's mission?

A Yes, it is.

Q Would you explain how and why?

A In a variety of ways, somebody's library card is the only thing that allows that person or anyone else to know what they've checked out, even if the material is overdue, for example. We are very careful and the staff is trained to be very careful when somebody checks out a book to not comment on that book that's checked out even if it is a comment that might seem very innocuous. We want to make it clear to library users that even if they're checking out how to get a divorce from my abusive husband, we won't say, oh, I see you've got this

book, to them. So confidentiality in that way is important.

We are similarly concerned about confidentiality of what questions people are asking and what responses they are given.

Q Can I take a book off of the shelves at the public library and read it in the library?

A Yes, you can do so.

Q Do you offer reference librarians?

A Yes, we do.

Q What is a reference librarian?

A Reference—public service staff, reference librarians and library assistants help people in their use of the library, particularly for finding information that they may want and need. And they are located at branch libraries and throughout our central library as well.

Q Are there methods by which I can ask questions of a Multnomah County Public librarian without going directly up to a desk and talking to that person face to face?

A There are. For some years we've offered telephone reference service and you can call from home or work or school and people do that about 80,000 times in any given year.

In addition, as of a couple of years ago you could ask a question over the internet. Your library card is the

locator for that information and we get back to you with a response to that question.

Q Why do you offer those two forms of reference librarianship as well as the traditional form?

A Well, primarily for the convenience of library users. A part of what we do is spend the public's money and figure out the best way for them to get use of it, and one is for them to be able to get the information they want and need as rapidly as possible, and both of those two methods help that happen.

Q Is confidentiality relevant at all to that service?

A I think in both those examples it is one of the benefits. It's not the reason why we've done it, but it is one of the benefits.

Q And would you explain why that is?

A Because you don't have to look somebody in the eye and ask them a question, you might not be comfortable asking them. And you don't have to do so in the hearing of somebody who might also be ask the information desk other than the librarian, another member of the public or somebody.

Q Is that a problem known to librarians, not wanting to ask the question?

A Yes, it is.

Q Could you elaborate on that?

A Well, I'll give you a recent experience. A young man asked for health information, a man who looked to be in his early teens. The reference librarian went with

him, this was at central library two, the health information and showed him that really it was hundreds of books, was there something in particular he was looking for. And he said that he wanted information on how to identify sexually transmitted diseases.

In this case the librarian and the young man found material that looked to be relevant in the library's catalog, and she actually went to the storage area in the basement, one of the books had recently been returned and hadn't yet been reshelved and brought it back to him so that he wouldn't have to encounter a page at the desk to ask for such information to be retrieved.

That's but one example, and we know as well that over the phone and through Ask Us Online, the internet connection, we do get questions that are unlikely to have—we're unlikely to have gotten that volume of questions on that subject over the desk in person.

Q Does the library take any steps to assist patrons in finding material on the internet that they want to find and avoiding materials that they don't want to find?

A That's our primary role, to help people find what they want and need rather than finding material that is not of interest to them or will waste their time, so we do that in a variety of ways, yes.

Q Can you describe come of those ways?

A Well, we've been talking about the kids' page, and we talked about the topics that are listed and the links that are provided.

In the adult material we do exactly the same thing. So we know what topics are frequently—frequent questions, it might be weather, it might be travel information, it might be cars, it might be job seeking, it might be history, a whole variety of topics on which we know—about which we know there's interest in our community and we'll provide people with appropriate links that we have evaluated to be able to find that information.

Q Do you provide any classes that would assist patrons?

A We provide a number of classes and we teach this material in two ways, by classes for children, for adults, I mentioned the cyber senior's classes a moment ago that we've just offered.

We offer classes in how to use the library's resources, as well as on how to access e-mail and search the internet in general in terms of quality of search engines and other questions.

But the majority of the teaching that we do is actually just in time teaching. In other words, not everybody will find the time to come to a class, and when you need to know something, you need somebody who can help you find it, and that's a lot of what—the work that our reference librarians do.

Q The problem of helping patrons find material that they want and avoid material they don't want, is that unique to the internet?

A No, it certainly is not. It's especially true in any library, but particularly a large one like ours with just

under two million items both print and otherwise that can be checked out. So a lot of what we do is help provide people with guides to get to what they want and need.

Q Did you take any steps to deal with people who might be offended that they passed by another user's computer?

A Yes, we do.

Q What is that?

A We do have privacy screens on all of our computers.

Q Would you describe the kind of privacy screen that you use?

A We've had privacy screens, I think, since we began offering internet access in 1995. We've recently replaced the ones we had with a new style that actually is part of the monitor. So it is physically attached to that computer rather than just something that folds down or slides over.

Q What are Ginnie coupons?

A I've been at the library 12 years and I came with a very strong belief that we wanted to make sure we heard from our public and we heard on a regular basis, so we instituted a feedback mechanism that goes by the name of Ginnie coupons.

JUDGE BECKER: It's named after you.

JUDGE BARTLE: It's named for you.

THE WITNESS: Named for me. That's what the staff calls them. We don't think the public calls them that, but they identify our interest in hearing complaints, comments or compliments.

In addition, say that if we have a way to get back to people, we will respond to them and we do that either by e-mail or by regular mail if they've given us an address.

BY MR. HANSEN:

Q Have you received Ginnie coupons complaining about the content of materials either in the print or internet collections of the library?

A We received many Ginnie couples on virtually any subject you can think of, and those subjects are among those that we have coupons on.

Q Can you give me some statistics?

A In the last fiscal year we had about just over 2,200 Ginnie coupons that were logged by library staff.

JUDGE BARTLE: What is the fiscal year you're talking about?

THE WITNESS: It ended the 1st of July, so it would have been —

JUDGE BECKER: Of '01?

THE WITNESS: Yes, that's right.

JUDGE BARTLE: So roughly July of 2000 to July 2001?

THE WITNESS: That's correct.

JUDGE BARTLE: Sorry, go ahead.

BY MR. HANSEN:

Q Of those 2,200 Ginnie coupons how many had to deal with the content of the material in the library?

A 37.

Q Can you break that down further?

A I think I can. Of the 37, 11 were particularly related internet content, 11 were comments in response to the county and the library board's position to participate as a plaintiff in this action, and the remainder were print related. We may have—

JUDGE BECKER: What related, I'm sorry?

JUDGE BARTLE: Print, print related.

THE WITNESS: Print to a book or a magazine. We may have had others. There is an additional form the library has had for a long while for print materials and we would have maybe double that number total that would have come in on these forms and the other form I spoke of.

BY MR. HANSEN:

Q Does the library have rules relating to what is acceptable behavior in the library?

A Yes, we do.

Q Would you look, please, at Plaintiffs' Exhibit 106. What is Plaintiffs' Exhibit 106?

A Behavior rules governing the use of Multnomah County Library.

Q And is that an official policy of the library?

A Yes, it is.

Q Why do you have such rules?

A Because we need them. In this case, this is a printout from what's available on the internet. They're also posted in general form in all library locations to make sure people are aware of them. And it's the way that we deal with behaviors of a variety of kinds that are not acceptable in the library.

Q And what are the ranges of things you would do with unacceptable behaviors?

A They range from telling someone to stop that action, to banning people from the library for a period of time up to as much as a year.

Q And might there also be occasions when it resulted calling the police?

A Definitely.

Q And does Plaintiffs' Exhibit 106 accurately describe the behavioral policies of the library?

A Yes, they do.

MR. HANSEN: Your Honors, I would move Plaintiffs' Exhibit 106 into evidence.

JUDGE BECKER: Any objection?

MS. GACKI: No objection.

BY MR. HANSEN:

Q Does the library have a policy with respect to—

JUDGE BARTLE: Well, why don't we do this, I think we can save time. We will—why don't you wait until the end of your case and then move in all the exhibits at once and that way—

JUDGE FULLAM: I'm inclined to assume they're all admissible when you—

MR. HANSEN: Yes, Your Honor.

JUDGE FULLAM: —offer them unless they're objected to.

JUDGE BECKER: I think that's a good idea. At the conclusion —

MR. HANSEN: At the conclusion of each witness? Of each witness, that will be fine, Your Honors.

BY MR. HANSEN:

Q Does the library have policies with respect to child pornography?

A Yes.

Q Would you look at Plaintiffs' Exhibit 105.

(Pause in proceedings.)

Q Would you describe what that is, please?

A It is a memo from the deputy director of Multnomah County Library, Ruth Metz, to staff concerning—it's a clarification of the previous document we were looking at.

Q And what are staffs supposed to do if they find material that they suspect might be child pornography?

A They're instructed to call the police if that's the case.

Q Are you familiar with the Children's Internet Protection Act?

A Yes.

Q And is the Children's Internet Protection Act consistent with the mission of the Multnomah Public Library?

A No.

Q In what way is it not?

A The Children's Internet Protection Act, as I understand it, requires libraries who accept certain federal moneys to provide only blocked or filtered access to the internet for children and for adults.

We have found that providing information in print and electronically is complicated and difficult and this would be an additional complication in trying to fulfill that mission for the public.

Q Is it simple a practical problem, practical—it would be complicated to put in place?

A Well, it is that. I think it is more than that as well.

Q In what way?

A Material that is illegal because if child pornography or its been adjudicated as obscene is not allowed to be used or viewed in our library, but there is a whole variety of other material that is neither adjudicated to be obscene or child pornography that people do regularly ask us about, and I am interested in making sure that we continue to have the ability to provide that information for them.

JUDGE BECKER: At the bottom line, Ms. Cooper, I take it if there was the perfect internet filter, or the perfect blocking mechanism, you would have no problem with it?

THE WITNESS: As a matter of fact I have said exactly that fairly often. The real difficulty is helping people find what they want and need. It is a very imperfect—the internet is still a very gross tool to use, and if I had a way to make sure that you would find what you wanted and needed and not what you didn't need or didn't want, whether it's called a filter or something else, we would definitely buy it.

JUDGE BARTLE: I think Judge Becker was asking if you had a filtering system which could automatically filter out anything that a court has declared obscene or anything that is child pornography under the Constitution of the United States, you probably would have no problem with that?

JUDGE BECKER: And no more?

JUDGE BARTLE: And no more, just that?

THE WITNESS: Yes, I think you're right about that. I had not considered that and I misunderstood your question earlier, but yes, I think the answer to that is yes.

BY MR. HANSEN:

Q Would the implementation of the Children's Internet Protection Act also cause practical problems in the library?

A Yes, it would.

Q Specifically are you familiar with the way in which the internet—the Children's Internet Protection Act provides different content that is to be blocked to children from that that is to be blocked to adults?

A Yes, I know that there is a difference.

Q And would making that distinction present practical problems with the library?

A It would. At the time you have a library card, you don't have a particular card if you're a child and another one if you're an adult.

Q And what would you have to do in order to change that?

A I haven't even begun to think about what would have to be in place both with our current group of several hundred thousand cardholders and those who apply for cards as well.

Q Would you also have—

JUDGE BARTLE: That wouldn't be that difficult a problem, would it really, to have different cards for children, have one that's red and have one that's blue.

THE WITNESS: We don't have them now, so it would be—it would be quite something to put it in place especially with our current cardholder use.

Part of the reason we do it this way is because once you get a card, you've got the card forever.

JUDGE BARTLE: I see.

THE WITNESS: And it would be an additional workload or an additional decision to decide exactly how old the child is and when you stop being a child and give them a different card.

JUDGE BARTLE: It would be a problem with including your date of birth? You do it on your license at least in Pennsylvania, your driver's license has your date of birth now, couldn't that be done on a library card?

THE WITNESS: I suppose it could be.

BY MR. HANSEN:

Q Do I currently enter something from my library card when I sign on the computer?

A Yes, you enter both the card number and a personal identification number.

Q Would separating children's library cards from adult library cards be contrary to the current philosophy of the library?

A Yes, it would be.

Q Would you elaborate on that?

A Now. We believe that we can't know what's right for an individual child, that only that child and more importantly their family can know what that child's maturity level is and from the context of that family's values and ways of looking at it.

There are some 12 year olds whose parents would not want them to have access to birth control information. There are some whose parents would hope that the library would be there to provide that access.

There are some five year olds whose parents don't want them to know where babies come from, and there are some who would. So we can't presume to judge for everybody in our community and we don't try to, rather we work with parents to make sure that they understand how to do that and can do it effectively.

Q Are you familiar with the provision that the Children's Internet Protection Act that requires the blocking of staff computers?

A I know that that's required, yes.

Q And would that present any problems for the library?

A As I understand it now, it would, particularly for identifying some of the cites that I described earlier that are linked to our home pages.

Q I didn't understand that. Explain that.

A The kinds of sex information we provide for teens, for example, the kinds of health information we provide for adults as well.

Q What about reference librarians and their use of the internet?

A Yes. A number of the staff computers are on public information desks and often they are used to help somebody find the information they want and need and those searches would be easier to perform if they were not blocked.

Q You referred earlier to the fact that the software that the library utilizes has shown evidence of both over-blocking and under-blocking. Does that present problems for you with respect to the mandatory use of blocking software?

A Yes.

Q In what way?

A Because such software would then result in the over-blocking and under-blocking like the examples that I have identified.

Q Why do you use the soft wall at all given the problems you've just described?

A Because it's very important that people have that choice and that's why we put this practice in place. For example, while I have some concern that parents may think that we're providing an environment that is without—that will be without concern to them and their children.

I still think that we provide them with something positive when we say and you can use the library in this way, use the internet and instruct your children to use it in this way.

Q Are you familiar with other libraries that utilize blocking software on a mandatory basis?

A I know that there are some that do.

Q Does the librarian community discuss that at professional conferences and meetings?

A Yes.

Q And have any of the libraries that you're aware of that use mandatory blocking software express concern about that use?

A I do know that at least one library—

MS. GACKI: Objection, hearsay.

JUDGE BECKER: Well, the objection is they have expressed concern.

JUDGE FULLAM: Yes. The fact that it was expressed, not the truth of what it said the question was what it was offered for.

JUDGE BECKER: We'll allow it.

JUDGE FULLAM: State of mind. Go ahead.

JUDGE BECKER: I'm not sure it's relevant, but we'll allow it.

THE WITNESS: Can you repeat the question for me?

BY MR. HANSEN:

Q Yes. Have the other libraries that you've referred to express concern about the mandatory use of blocking software?

A I know of at least one library with mandatory blocking software that has expressed concern about the effect of that software?

Q Which library is that?

A Tacoma.

Q And who was it that expressed that concern?

A I spoke at the Public Library Association conference with the library director just briefly.

Q And specifically what was the nature of her concern?

A She offered to me her concern about the effect of blocking software and their ability provide library service.

Q Are you familiar with the provision of the Children's Internet Protection Act that provides that librarians can unblock sites based upon a bona fide research or other lawful purpose?

A I know that that provision exists.

Q And does that provision provide any practical problems for you if you were to be required to implement the act?

A I've talked with, you know, probably ten lawyers and librarians specifically about this and nobody comes up with the same definition of what this means or how it would actually work, so I believe it would cause some problems, yes.

Q If the standard were to require you to judge the purpose of the patron in going to the web site—

JUDGE BECKER: Well, why don't you give her the exact language from the act? Was it bona fide research?

BY MR. HANSEN:

Q Bona fide research or other lawful purpose.

A Right.

Q What are the options of how you would interpret that?

A Well, first of all, that's contrary to how we operate. In our library and in most libraries we really don't ask why people want to know what they want to know. That's really their business and not ours.

So we don't judge why somebody is asking for how you make jelly beans or how much beer is consumed in Oregon. We don't say is that work or personal, or make a judgment in any way.

So it would be a very different role for us and I'm not sure how we would make a determination about bona fide research.

Q To the extent you were called upon to judge the other half of that, the other lawful purpose —

A Right.

Q —how would you do that?

A Well, except for the categories that we've talked about, almost everything would be lawful.

JUDGE FULLAM: So you would determine it as meaning you could unblock any time you wanted to?

THE WITNESS: It might well mean that.

BY MR. HANSEN:

Q At what level within the library would you provide unblocking?

A Again, I don't think that's clear in what's included in the statute, but we would have an interest in providing it at the lowest level possible.

I'm especially concerned about how people would respond to a delay in getting information they need. But we're already working to make sure that people know that the library is the place where they can go to get help finding the information they want and need, and I hate to see you can get help but, oh, by the way, wait now while somebody decides what to do about this situation.

JUDGE BARTLE: In other words, you wouldn't want a policy where you had to go to the county commissioners to unblock?

THE WITNESS: No, or even to me.

BY MR. HANSEN:

Q If you could give the authority to unblock to all of the librarians on the library floor would that present any problems?

A Well, remember that it's not just librarians, it's library assistants as well, so it's not everybody who serves the public that way who is—have a library degree or is classified as a librarian.

In our case that would mean nearly a hundred people would have that authority and I would have some concerns about the consistency with which that decision would be made from time to time.

JUDGE BECKER: Well, do you have some ba\ranch libraries in remote locations?

THE WITNESS: Yes, we do.

JUDGE BECKER: How far out?

THE WITNESS: About 20 miles.

JUDGE FULLAM: What kind of communities are they?

THE WITNESS: Those are a suburban community as large as a hundred thousand. There are very rural communities, a couple of hundred in a couple of cases.

JUDGE FULLAM: What are the rural communities, for example?

THE WITNESS: Troutdale, Wood Village, Corbit.

JUDGE FULLAM: And there are libraries—

THE WITNESS: Yes.

JUDGE FULLAM: —in those places. And who are the staffed by?

THE WITNESS: They're staffed by supervisors or library assistants. There's a youth library in all of our libraries, but there's not a reference librarian in all of our libraries.

JUDGE BECKER: Are any of them staffed entirely by volunteers?

THE WITNESS: No, although we use volunteers in every single one of our operations.

JUDGE BARTLE: Would they have authority?

THE WITNESS: They don't usually work—staff a public service desk, so they wouldn't have this responsibility.

BY MR. HANSEN:

Q Do you know whether you could set up the library system in such a way that a librarian in one branch could provide—could unblock sites?

A I don't know. It may be possible.

Q And do you know whether if you set it up that way it would unblock for all of the other branches as well or just for that one branch or just for that one patron?

A I don't know.

JUDGE BARTLE: So you could have a patron wait until a more "liberal" was servicing the desk and wait until that time to come in and ask to have it unblocked as opposed to somebody else?

THE WITNESS: That's possible.

JUDGE BARTLE: You could sort of—instead of having random selection, you could wait—

JUDGE BECKER: For a more libertarian.

THE WITNESS: It's like shopping for a librarian.

JUDGE BARTLE: Or a more libertarian, yes.

JUDGE BECKER: On the other hand, you could have let's say somebody in Portland or a couple of specialists who would be available and on call at all times for a call in by the Trout—was it Troutdale or whatever who could quickly answer the question, isn't that so?

THE WITNESS: We could, but they're already pretty busy, so I'm reluctant to identify that it would be easy for us to have that added assignment for our staff.

It's also not clear to me if we're talking about a site by site blocking or a session by session blocking or if an individual comes and say this site is blocked and I want to see it or says I want to do research on hmm-hmm, and it might be blocked. I don't think that's clear, either.

BY MR. HANSEN:

Q Are there reasons why patrons would not want to request unblocking?

A Yes, I think there are.

Q Could you explain what that is about?

A Well, I think for one reason it would be the time, you know, the difficulty of giving up your internet computer terminal or raising your hand or something to get a librarian to come over and deal with that.

And, in addition, I can understand circumstances similar to those we talked about earlier where somebody might be reluctant to call attention to their request for information in a particular area.

Q Given these problems that you discussed, what will the library do if the act takes effect?

A I don't know. We have not make a decision about what we would do.

MR. HANSEN: Your Honors, I have no further questions. I would move the admission of Plaintiffs' Exhibit 105.

JUDGE BECKER: Hearing no objection, we'll admit it.

(Plaintiffs' Exhibit 105 is admitted in evidence.)

JUDGE BECKER: Ms. Gacki, you can cross-examine.

(Pause in proceedings.)

JUDGE BARTLE: Ms. Gacki, could you give us a hint as to what volumes you've placed there so we can get them out.

MS. GACKI: 227—

JUDGE BECKER: 2 what again?

MS. GACKI: 227.

JUDGE BECKER: Go ahead, Ms. Gacki.

[CROSS-EXAMINATION]

BY MS. GACKI:

Q Ms. Cooper, the Multnomah Public Library keeps records of incident reports, correct?

A Yes, that's correct, it does.

Q And in some of these incident reports they concern patrons access of pornography on library internet terminals, correct?

A Some do, that's right.

JUDGE BECKER: Which one is this now? What exhibit are we talking about?

MS. GACKI: We're going to go to—I will get to those in just a second, two more questions and then we're at the exhibits.

JUDGE BECKER: Okay. Very well.

BY MS. GACKI:

Q In your letter you also retained some e-mail messages between employees, correct?

A That's correct.

Q And some of those e-mail messages between employees relate to patrons access of pornography on the internet, correct?

A Yes.

Q At this time I would refer the witness and the Court to the Exhibits 254, 256, 257, 258 and 261.

MS. BEESON: I'm sorry, could you list them again?

MS. GACKI: Sure. 254, 256, 257, 258 and 261.

JUDGE FULLAM: 261 is in the next book, okay.

JUDGE BECKER: Go ahead.

BY MS. GACKI:

Q Do you recognize these exhibits, Ms. Cooper?

A In a general way I do, yes.

Q These were the incident reports and e-mail messages that I had previously mentioned, correct?

A Yes.

Q And these incident reports are compiled by employees of the library in performance of their job duties, correct?

A Yes.

Q And they're reported to the library system, correct?

A Can you—

Q They are reported to people in your office, to people in the executive offices of the library system?

A In some cases yes, in most cases we just keep them on file.

Q But they're regularly kept according to—

A Yes, that's correct.

Q Your computers are equipped with privacy screens you've testified, correct?

A Yes.

Q And privacy screens allow the person who is looking directly at the screen to be able to see the material that's being displayed, correct?

A Correct.

Q And if patrons at your library choose to view pornography on your internet, they are supposed to use a terminal that is equipped with a privacy screen, correct?

A Yes.

Q And, in fact, it has been your library's practice to tell patrons only to view pornography at terminals equipped with privacy screens, correct?

A All of our computers are equipped with privacy screens.

Q In the past, not all of your terminals have been equipped with privacy screens, correct?

A I think we have always had privacy screens for all computers. Sometimes they fall off or get moved.

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[TESTIMONY OF NUNBERG]

[March 25, 2002]
[pp. 256-314]

* * * * *

BY MR. SMITH:

Q In summary, Dr. Nunberg, what conclusions did you reach about the current operation of the commercially available software in terms of its efficacy?

A I concluded that none of the programs that are currently available can accomplish their stated task of filtering out—let me just use sexually explicit material in a kind of vague way here.

Q I've been doing that all day.

A Well, just without specifying—can filter out such material without also both over-blocking a great deal, that is to say tagging as sexually explicit material content that shouldn't properly be included in that category, and under-blocking, that is to say failing to tag a substantial amount of material that should properly be included in that category.

JUDGE BARTLE: Of course, doesn't it depend on what you mean by sexually explicit material?

THE WITNESS: Absolutely. But in a sense, it doesn't, in a sense, because however you define it—

JUDGE BARTLE: However you do it.

THE WITNESS: —the under-blocking and over-blocking are going to be problems. You can define it in different ways and make it narrow or wider, but however you define the category—and in this sense, sexually explicit material is no different from articles about baseball. Whatever the category is, this is a chronic problem with this kind of software.

JUDGE BECKER: I guess you could only—your problem can only be solved if you want to omit any article that has a certain word, that way, that would be simple?

THE WITNESS: Well, sure, if you want to say give me every article that, for instance, mentions—

JUDGE BECKER: That has the word sex in it.

THE WITNESS: —the word baseball or sex—

JUDGE BECKER: Or mentions the word sex.

THE WITNESS: —then or let's say exclude—

JUDGE BECKER: That's easy.

THE WITNESS: —every article that mentions the word sex, then I will exclude a very large amount, by no means all of the sexually explicit material—

JUDGE BECKER: I understand, but—

THE WITNESS: —on it, but I'll also exclude article in Scientific American, articles in Women's Day and so forth.

JUDGE BECKER: I understand. If I could refine that, let's assume that the particular document does not contain the word sex but contains a word that ends in S followed by another word that begins in E-X.

THE WITNESS: That could or could not be a problem for the software depending on how it was implemented. There are cases that have been tried, I don't think any of them were entered here, in which the filtering software blocks, for example, the documents in which the name Middlesex appears.

There is a case that was cited of—it's actually a class, this is over here at the University of Pennsylvania, who teaches Augustine and the Early Christian Fathers, and he put up a great deal of St. Augustine in Latin, and the site was—that text was blocked by one of the filters, not one of them here, because it contained the word cum, C-U-M, which presumably was also on somebody's list.

So the possibility of over-blocking with that technology is very real and—

JUDGE BARTLE: And of course our wonderful town of Intercourse in Lancaster County in this district would have these—

THE WITNESS: Right. And Beaver College, another Pennsylvania institution has had problems along this line as well.

JUDGE BECKER: They've changed the name. It's now Arcadia.

JUDGE BARTLE: They haven't the name of Intercourse.

JUDGE BECKER: No, they have not.

BY MR. SMITH:

Q Doctor, what conclusions did you reach, in summary, about the theoretical or inherent limits of software as a mechanism to block access to sexually explicit material on the internet?

A Given the methods that are available to software to deal with any kind of natural language, any kind of human language content, the difficulties posed by the size and dynamic nature of the worldwide web and the limitations of implementing these kinds of systems, the problem of substantial over-blocking and substantial under-blocking is going to be persistent for any state of the art, not just the way the stuff is implemented today.

JUDGE BECKER: Now, when you talk about the dynamic nature of the web, does that mean there are new sites every few days or, well, every day or—

THE WITNESS: Yes, the web is changing at an extraordinary rate, by one estimate, and that's actually about two years old, a million and a half sites per day are being added to the worldwide web.

BY MR. SMITH:

Q Is that pages or sites?

A I'm sorry, a million and a half pages, yes, are being added a day to the worldwide web. And somebody has to keep up with those sites, link in and out, particularly sites of this type tend to be not surprisingly to disappear very quickly and to reappear under new names and so on.

So keeping up with that, given the size of the problem, is just an inherent limitation of what you can do with any kind of software.

Q While we're on that subject, Doctor, what is the overall size of the material on the web?

A It's very hard to answer, partly because nobody is quite sure where the worldwide web ends, and partly because you don't know what to count. Should it be sites, should it be pages, should it be the number of servers or computers on the internet?

Partly because the tools for measuring the size of the web or themselves in precise. By a couple of recent estimates, there are two billion pages on what we can call the publicly indexable web.

JUDGE BECKER: What's that mean, indexable?

JUDGE BARTLE: An index.

JUDGE BECKER: Indexable?

THE WITNESS: Indexable. It's not my word and I wouldn't—that's the part of the web that can be found or located by the standard search engines like Google and Alta Vista, which use certain methods to find pages on the web, and that's what they could find.

And then another estimate has about 11 million web sites as a—that's from the OCLC.

BY MR. SMITH:

Q Okay. And can you just briefly explain the distinction between web pages and web sites?

A A web pages is basically—you have a browser, which is basically the software, the window through which you look at the web. A web page is basically anything that shows up in that browser. It might be text, it might be pictures, it might contain links or sound files or video files. But it's just what shows up in your window when you access a certain web address.

And the other was web site. A web site can be—well, you can use the word in two ways. It might be just all of the pages that are available at a particular server or computer that's linked to the internet. More often nowadays it's used to refer to the collection of pages or resources that are made available by a particular organization or company or person, whether they're located sometimes on more than one computer or whether they constitute only part of the content available on a particular computer.

JUDGE BECKER: Is a server a single computer, is that—

THE WITNESS: Yeah, a server is—

JUDGE BECKER: —or a network of computers?

THE WITNESS: A server is generally a—with certain caveats, a server is a single computer. So Stanford, you might speak of Stanford's web site, even though in fact Stanford has a number of different servers at which its—or IBM has a number of different servers at which its content is located.

You might also speak—I might say that I have a web site, even though what I have is basically a home page

and a few articles that are part of the larger site at the center for the—

JUDGE BECKER: So if I want to look up Dr. Jeffrey Nunberg, I didn't have to look in here, I could have gone on the—

THE WITNESS: You could have gone on—

JUDGE BECKER: —I could have gone on the internet and I could have found your visage and your—

THE WITNESS: And my vita and my—

JUDGE BECKER: —vita and so forth.

THE WITNESS: —and qualified me remotely.

BY MR. SMITH:

Q Can you explain why it is that only some portion of the web is publicly indexable?

A There are a couple of reasons. Indexable is first of all a theoretical limitation. These web search engines like Google and Alta Vista locate content in the following way. They'll start with a certain number of pages and they'll take those pages and they'll put them on their server and they'll represent them in a certain form.

And then, if those pages contain links, they'll follow those links.

Q And what's a link?

A A link is a little bit of code in a web page that instructs a browser to go and retrieve another page

that's at some other location. So it will follow, if it comes to a link, it will open that link—for instance, if it comes to my web page and there is a link to a paper, an article that I published in the American Prospect, the browser will—the robot that's used by the search engine will find my web page, see that link, click on that link so to speak and go to the American Prospect article.

And then it will take that and put it in its index. If there are links in that article, it will follow those and so on. It's like a chain letter.

JUDGE BECKER: Is that what the search engine does?

THE WITNESS: That's what the search engine does to compile the index of documents. The index is really the archive of documents that it stores on its computer.

BY MR. SMITH:

Q Right, but that's not actually the function of the search engine. What is the name of the process you just described?

A That's called spidering. And a spider is one of these little processes or robots, it's sometimes called, that goes out on the web and follows all the links and collects all the material and brings it back for storing on a single computer that's lodged, or set of computers in the case of Google, that's lodged at Google or one of the other search engines.

And then, when you give a request to the search engine for, say, Jeffrey Nunberg filters, it goes into its index, it see, oh, here's an article in The American

Prospect that contains that contains the name Jeffrey Nunberg and filters, it returns the address of that article, and then you can click on that address and find the article itself.

Q Okay. And why is it that the spidering doesn't reach all of the web?

A Well, for several reasons. First of all, the spidering, even in the theoretically limited case, can only locate pages that are linked to from other pages. If, for instance, as is the case, I put my vita up at my web page—at my Stanford web pages, but don't put any links to it from my home page or any other pages, then the spider won't be able to get to it by linking.

It's also the case that many large sites, for instance a lot of news sites and other kinds of sites, will put instructions at the top level of their web site so that when the spider comes in to find content, the instructions will warn the spider off and say don't go any deeper in this web site. And although the search engines aren't obliged to conform to that, they, in fact, do.

So there's an enormous amount of content that just can't be located by any spidering process.

Q Now, this portion of the web that's not indexable, is that something that's accessible to people if they know where to find it?

A Oh, sure. You could find my—all I have to do is send you an e-mail with the address, the URL for my vita, you click on that or just enter it in your browser and it will find it. But there's no way to find it automatically by pursuing because there's no links to it.

Q And are there web sites that, as a deliberate policy, do not link to anything else but distribute their identity in other ways?

A There are plenty ways to, even if you want to have public access to your web site, there are plenty of ways to give access to what you could, as in the example I just suggested, send an e-mail to one individual. Or you could do a mass mailing to individuals.

You could—there are forms of links that don't show up to the spiders, but nonetheless can be followed. You might go to a web page and there might be what's called Java Script Program that basically works like a link but isn't the kind of thing that will show up to the spider. So there are lots of ways to even publicly distribute material on the web without establishing any explicit links to it.

JUDGE BECKER: What's that got to do with the issue that he's opining about with respect to the inability to block all—well, the under-blocking or the over-blocking?

MR. SMITH: It relates to the ability of the filters to avoid under-blocking because a web site that is not indexable, not reachable, doesn't ever show up on the—

JUDGE BECKER: But what I want, will you ask him that as a summary?

MR. SMITH: Sure. I thought you were asking me.

THE WITNESS: Should I just answer?

JUDGE BECKER: Treat my query to Mr. Smith as a question to you, Dr. Nunberg. Tinkers, baseball, tinkers to eavers (ph) to chance, okay.

JUDGE BARTLE: Do you see the link?

THE WITNESS: If you're going to do a filtering of web content in—however you do it, you've got to collect the pages you're going to put on a list of sites that satisfy whatever definition you're after. And in the course of collecting the pages, you're going to rely on search engines like Google and Alta Vista and so on. If they can't find a page, you are never going to get to look at that page to classify it one way or the other.

So if there's large amounts of content that aren't—and some people estimate that the amount of content, sometimes called the deep web that is not even in theory even accessible to the web—to the search engine, is two to ten times as much as is accessible.

All of that stuff can never be found by the search engines, so can't be harvested for purposes of categorization.

JUDGE BECKER: So it can't be blocked, right?

THE WITNESS: It can't be blocked, but it can't be found by these mechanical means that you have to use.

JUDGE BECKER: So if it can't be blocked—but if it can't be found, then what difference does it make?

THE WITNESS: No, it can't be found by the search engines. And I say, if I sent my vita, for instance, nobody will—even if one of these companies wanted to

classify my vita, and I hope would not classify it as sexually explicit—

JUDGE FULLAM: Well, how could a library user get access to it if it can't be found?

THE WITNESS: Well, there are lots of ways. For example, e-mail. There are programs that go out, and I've had this happen to me, and I think many people have, that go out looking for new e-mail addresses and spamming everybody. That's sending messages to everybody that they collect with information about the new porn site.

This happens to me routinely since I put another web address up once on a—

JUDGE FULLAM: You lost me on the e-mail. Who sends the e-mail and to whom does it get sent?

THE WITNESS: Let's say I put up a site for a book I just published at earthlink, which in fact it happened to me, and I put an e-mail address at that site. There are programs that go around and look for e-mail addresses, and when they find an e-mail address, they just send you what's called spam. In this case an e-mail that says sexually explicit material or hot babes, whatever, for, you know, click on www.xxx.whatever. And this routinely happens.

I mean this is not—and it's a very easy way of publicizing your sexually explicit site, or your mortgage broker's site, or whatever the case may be, or your Viagra site without actually having to worry about anybody linking to your page.

JUDGE BECKER: So what you're saying is that a program that was blocking the mortgage broker or sexually explicit or what have you couldn't find this deep web material—

THE WITNESS: Right, there's no way to find it.

JUDGE BECKER: —and therefore it couldn't block it.

THE WITNESS: Right.

JUDGE BECKER: But it would nonetheless be accessible?

THE WITNESS: Easily accessible to anyone, anyone who had received one of these e-mails. And that's only one of the ways of publicizing these sites.

JUDGE BECKER: But this is an under-blocking then?

THE WITNESS: Yes, it would absolutely speak to under-blocking.

BY MR. SMITH:

Q Dr. Nunberg, are there any reliable estimates of the percentage of web sites in the publicly accessible part of the web that are sexually explicit?

A Reliable is a tricky word. There are two—there are a couple of estimates. There's one by OCLC which has done—

JUDGE BECKER: What is OCLC?

THE WITNESS: O C L C used to stand for Ohio Consortium, it's a—

JUDGE BECKER: Library Central.

THE WITNESS: —it's a group that does the cataloging. So what I think their name is just OCLC.

JUDGE BECKER: Can we stipulate what OCLC is?

MS. BHATTACHARYYA: Yes, Your Honor, if someone can tell us what it is.

MR. SMITH: My understanding is that it doesn't—

JUDGE BECKER: What is it, Ohio?

COUNSEL: Ohio College Library Center.

JUDGE FULLAM: Yes, it used to do all the central —

THE WITNESS: But I believe they no longer call—I think they just call themselves OCLC now. So I think they don't even use the —

MR. SMITH: So it now a required acronym, there is no words—

JUDGE FULLAM: It's what libraries go to to get information they don't have in their own libraries.

MR. SMITH: It is the organization that coordinates the inter-library loan.

THE WITNESS: They've been doing a survey for a number of years of the size of the internet, which involves sampling IT addresses, which are basically

computer addresses, and seeing what's out there. They estimate—

JUDGE BECKER: Okay. So what did OCLC estimate?

THE WITNESS: OCLC estimated about one percent of sites dealt with—I can't remember the characterization they gave it, whether it was sexually explicitly content or pornographic content.

JUDGE BECKER: And how many would that be in number?

THE WITNESS: Well, if there are ten million sites, that would mean 100,000 sites—

JUDGE BECKER: That's a lot of sites.

THE WITNESS: —that dealt with sexually explicit content. There's another survey that was published in an article in Nature a couple of years ago that estimated that 1.5 percent of servers, that is to say the computers on the web, contained some amount of—and again, I don't remember whether the characterization—

JUDGE BECKER: You're talking about in the hard drive? Contained in their hard drive?

THE WITNESS: Well, contained, no, as pages, so if you have a server on the internet that has a number of different pages—a number of different kinds of content, that 1.5 percent of such servers of such computers, contain some amount of sexually explicit material. And it's hard to translate that into an estimate—

JUDGE BECKER: Where? Are you talking about in their hard drive? You're not talking about on web pages?

THE WITNESS: No, in the material that could be publicly accessed.

JUDGE BECKER: Okay. These are on web pages?

THE WITNESS: These are—a server is a computer that's on the web whose pages or part of whose content can be accessed remotely over the internet. So the part of the content that could be accessed over the internet contains sexually explicit material in 1.5 percent of the servers in their survey.

BY MR. SMITH:

Q Can you tell us how often it is that content tends to change on the web?

A There have been estimates that, if memory serves, that the average web site has a half-life of about 90 days. As I mentioned, the Nature article that appeared in 1999 estimated 1.5 million new pages per day.

Q What does it mean to say that the average web site has a half-life of 90 days?

A Most web sites just don't last that long. They appear, they disappear, people put up content. I think it's web page, I'm sorry, not web site.

The people put up content, they take it down, they revise it, they move it somewhere else. It's a very—

JUDGE BECKER: If it's not taken down, does it just remain?

THE WITNESS: So longer as the server is there or so long as the person continues, the owner of the account continues to pay their account and so long as the institution remains at the same institution, it will remain there.

BY MR. SMITH:

Q Now, the particular types of internet blocking software that you studied and educated yourself about, I think you said use lists of sites that they block?

A They have, they all operate with something called a control list, which is a list of sites that's been compiled by one of several methods that contains sites that are preclassified as belonging in certain categories, and in the case relevant here, as belonging in categories that they describe in various ways.

Some describe it as sexually explicit, some describe it as pornographic, some have several categories in this area, some have only one. But the control list is a precompiled list of sites to which categories have—or pages or addresses to which categories have been assigned.

Q Now, the actual entries on these control lists, what form do they take?

A Well, it might be helpful if I just could be a little professorial for a moment?

JUDGE FULLAM: Is there a microphone near there?

JUDGE BECKER: Yes, right there. Just be sure to speak into the microphone.

THE WITNESS: So for example, suppose there's a page containing the picture of Miss September at the Playboy site and I want to categorize it as being sexually explicit or something like that on my control list. That page will have a URL that might look like this (indicating).

This is continuing (indicating).

So this URL, which is a long string of characters, is the universal resource locator, this is the address of that particular page. And if I enter it into my browser, the browser will return that page.

And this URL, like most URLs, has several parts. It's got this part, http:// which tells you that—tells me the browser should use a certain, to locate the page, it should use a certain transfer protocol, in this case the http, transfer protocol.

It has this part, which is sometimes called the root URL or the root node, that's name of the computer on which, the server on which this page is located.

And it's got this part,/month/missseptember.html, this might be the file on that server in which the months are kept and this might be the name of that particular page.

So one way to block the page would be simply to say, when somebody enters this long URL, return a message like the one that you were seeing, you know, this page has been blocked for whatever reason.

Another way to block the page would be simply to enter—you say well, we're going to block everything at the Playboy site, so everything that has this top level

URL or root URL will be blocked, and then this will be blocked by—

JUDGE BECKER: But what's the vehicle by which it's blocked?

THE WITNESS: The vehicle in the sense—

JUDGE BECKER: Yes, mechanically, how is it blocked?

THE WITNESS: If the URL is entered, the—well, there are several ways to implement these systems. It could be sitting on your —

JUDGE BECKER: I mean what does the blocking program do?

THE WITNESS: It could be sitting on your PC or it could be sitting, in which case, if you entered the—it could be installed on your PC, in which case if you entered this URL, it would look at the list it had and return, instead of going out to find this page, would return a message that said this page is not—

JUDGE BECKER: So that this URL would have to be on the blocking list?

THE WITNESS: It would have to be on the blocking list. Or, it could be the case that this particular URL isn't on the blocking list, but that this root URL playboy.com is on the blocking list, in which case it just says, well, it's in that.

Or there's a third possibility which I should mention. This, when you send a request to the internet, so to speak, to return this page, it looks at this www.

playboy.com and it looks that up as a number of a particular server called the IP number, and that's a series of four, so that—I'm just guessing here, but 15 point 54 point 0 point 92 or something like that.

There would be some number associated with that computer. And for various reasons, and perhaps we'll come to it, might also—and most of the assistance also do list that number, so that this would be another way of blocking access to that particular computer on which this page was sitting.

So any three of these, and in fact all three, are used by filtering software companies whether the software is located on your PC or on a remote server or a proxy through which access, say to a library, is being monitored.

JUDGE BECKER: What do the numbers derive from?

THE WITNESS: This is the—this number—every server that's on the internet has an IP number (indicating), which is this series of four octets that can range from zero to 255.

JUDGE BECKER: So you would simply identify the server which has the punitively offending material.

THE WITNESS: Because if I entered instead of—I have no idea whether this is, in fact, the number of the server or not, but it could be. But if I entered just HTTP://15.64 et cetera, it would bring up—

JUDGE BECKER: HTTP means Hyper text transfer Protocol, right.

THE WITNESS: Absolutely, yes, and that's the—this is how you should go an access that number.

JUDGE BECKER: So if you did that you would eliminate every article in Playboy?

THE WITNESS: Right, and if I did that—and I could do this either by—

JUDGE BECKER: Whether it has explicit material—

THE WITNESS: Right—

JUDGE BECKER: —or sexual material

THE WITNESS: —anything that's at the Playboy site. If I pout in www.Stanford.edu—

JUDGE BECKER: All right. Fine.

THE WITNESS: —everything at Stanford be blocked.

JUDGE BECKER: So those numbers or the broader name is a blunter instrument but it blocks more.

THE WITNESS: It blocks more and it's a procedure I guess we're going to come to it, it's a procedure that all filtering software invariably makes use of in the course of blocking.

THE COURT: So if it got down to just blocking Ms. September it wouldn't block necessarily Ms. October?

THE WITNESS: Right, not then it would just block this particular page and Ms. October would be passed.

BY MR. SMITH:

Q Okay. Resume your seat, I think. One more sort of general issue I wanted you to discuss before we get to specifics.

MR. SMITH: And I think perhaps, Your Honor, I'll probably be able to do the generalities now, and we can probably start with a closed room for a few minutes in the morning if 5:00 is the cut off.

BY MR. SMITH:

Q You mentioned a lot in your report, the concepts of precision and recall and I wonder maybe even flipping another page you might tell us—

A Right.

Q —what those two terms mean?

(Pause in proceedings.)

THE WITNESS: Forgive me I need to write this down.

So these are two notions that are used in the evaluation of the classification or information retrieval systems uniformly and that obey certain very general laws that govern the operation of these systems.

If you're evaluating a system you want to know two things about it. First of all, of the total number of in this case pages for example that a system returns or classifies, how many are correctly classified?

So for example, suppose I have a system that is trying to find dog pictures. I have a set of pictures that contains a 100 pictures of animals and 200 of them are dog pictures, and I asked this system to go out and

identify the dog pictures as opposed to other kinds of pictures it returns 100 pictures that it identifies as dog pictures and 80 of those are in fact pictures of dogs.

Then having returned 80 of the 100 pictures that were returned are correct, I would say it has a precision of 80 percent.

JUDGE BECKER: Except you said there were 200 dog pictures.

THE WITNESS: Right, well, now of the—

JUDGE BECKER: Oh, I see.

THE WITNESS: —it returned 100, right so, it said here are 100 dog pictures and I look and I say well, of these 100, 80 are in fact pictures of dogs so if it returned a page there's an 80 percent chance that it is a picture of a dog. But if you say another problem is that, there are 200 dog pictures it only returned 80 of those 200 dog pictures, so it has a recall that is to say, the total number of dog pictures in the domain of 40 percent.

BY MR. SMITH:

Q Which is calculated?

A Right, so this would be the percentage of the total —the total in the category I should say.

JUDGE FULLAM: The total that it should have gotten?

MR. SMITH: Right, that are returned.

There's inevitably a trade off whenever you're doing one of these systems between precision and recall. So

in the case of my dog picture finder, I could say, well, you know I want to get more recall here so I'm going to loosen the criteria. So that now, anything that looks remotely like a dog picture is going to get returned, and my recall will start to climb up at that point because I'll be getting all these pictures that are only kind of marginally dog pictures.

JUDGE BECKER: And you may also get pictures of wolves so—

THE WITNESS: Exactly, wolves and foxes and lost ocelots and so on will come in.

If I want to increase the precision I say look I don't really want you to return anything that isn't absolutely a dog picture. The wolves and foxes will start to disappear but now some of the marginal dog pictures will go with it.

It's like the example I've given when I taught this is sort of like you're building a bird house and you're trying to make the opening the right size to let, you know so that all the sparrows can escape the hawks, and if you make it really small only sparrows can get in and the hawks can't but some sparrows are going to get eaten.

If you make it bigger all the sparrows can get ion but now some hawks will get in, and inevitably there's a trade off depending on how big you make that opening, how generously you define the category and that's just endemic for systems of this type.

BY MR. SMITH:

Q Okay. Now, does that trade off apply to kind of blocking software that's at issue that's in this case?

A Absolutely, it applies to every possible kind of software or system for that matter, or method that's involved in doing classification of any type.

* * * * *

BY MR. SMITH:

Q Now, Dr. Nunberg, in preparing your testimony, you studied the depositions of the various filtering companies?

A Yes.

Q And how many of those were there?

A There were three, one from N2H2, one from Cyber Patrol and one from Smart Filter.

* * * * *

A So again, let me stress that this is just a general procedure in classifying content on the web, whether it's a question of classifying sexual explicit content, material on baseball, appellate decisions or anything, you're going to follow the same procedures. You're first going to begin by harvesting from the web a large number of pages that are—or sites that are candidates for belonging in the category that you're interested in.

I'll mention these four general procedures generally, and then I'll specify. The second thing you're going to

do is try an winnow that group into a smaller set that might be candidates for inclusion on your control list again by automatic means.

Third, you're going to have a review of what comes out of the winnowing process, possibly by hand of at least some of the sites that are turned out. And, fourth, having identified some sites as belonging to the suspect category, you're going to, let's say, categorize by generalization—by association.

JUDGE BECKER: But you're talking about the blocking company doing this on an individualized basis. This isn't a blunt key word kind of operation.

THE WITNESS: Well, there are four stages here, if I may, Your Honor, just go through these.

JUDGE BECKER: All right.

THE WITNESS: So the first thing you want to do is just find all of the pages that might contain sexually explicit content and the filtering companies as per their depositions use several methods for that.

The first is to go to these very large search engine indexes like Google, and to give them lists of—give them queries containing words that are liable to return numerous pages that belong to that category. These might be, as using Judge Bartle's example, you might just say, sex or hotbabes, or whatever, and take back all of the pages or some set of the pages that are returned by Google for that. So that would be using search engines.

The filtering companies might also go to particular pages that have directories of sexually explicit sites or

what are called web rings that are kind of collections of pages that all deal with a certain topic, so there might be specific directories.

JUDGE BECKER: Does that mean they look at each one?

THE WITNESS: Well, no, for this purpose they're just trying to assume a candidate set—

JUDGE BECKER: Okay.

THE WITNESS: —and this is all going to be automatic.

JUDGE BECKER: This is the harvest.

THE WITNESS: They'll give the harvest—they'll go to Google and they'll say, give me all the pages that have to do with—that have the string anal sex in it, for example, everything that contains that string, Google will then look at.

Now, Google, I should mention, if you give the query, anal sex, to Google, it says there are 530,000 sites, the last I looked, that have that string of words in them. Google will actually only show you the first 2,000 of those sites, you can't get beyond that, the Google won't show it to you. But, nonetheless, that will give you at least 2,000 sites that contain that string and these other methods will give you others.

And then you may also have your own little spider like the one used by the search engine, but a much less robust version, that goes to some of these pages and clicks on the links in the pages returned by those to return more pages.

So with this you'll recover a large set of sites that you haven't looked at all, but that possibly might be in this category, and presumably lots of sites that—

JUDGE BECKER: This is a big enterprise to do this, a lot of person-power to do it, it takes a long time to do this?

THE WITNESS: My understand, again, from the depositions is that some of this is done mechanically. The filtering companies have staffs of in the dozens of people, I think that's a fair characterization. But they're not of the size—they're not in the order of the computational resources of staffs of companies like Google and Alta Vista which have hundreds of employees and—

JUDGE BECKER: Okay.

THE WITNESS: —hundreds—just representing the amount of content on the world web—the worldwide web takes hundreds of computers just to represent it, just to represent it all.

JUDGE BARTLE: But if you say there are 500,000 which have the words, anal sex, and they only tell you about 2,000 of them, what about the rest of them?

THE WITNESS: Those sites will be returned in the Google search. So you're only going to get to look—

JUDGE BARTLE: So that's not going to be much of a help for you. You eliminate 2,000.

THE WITNESS: Well, you might—now, I'm going to have to speak on the filtering—

JUDGE BARTLE: No, but you eliminate 2,000.

JUDGE FULLAM: Will the filter apply to the other 480,000?

THE WITNESS: The filter won't—if it uses only Google to locate pages, and there are these other methods that the filtering company uses, it—

JUDGE BARTLE: So you'll have to go to other methods, then.

THE WITNESS: —will not find any of the 480—or 528,000 pages that are not returned by Google that contain that string.

Now, it might also give numerous different strings and they might come back because they contain—those same pages might contain some other word or pair of words that will come up in the first 500 of the first 2,000 of Google, but no, in principle they won't be looked at.

So from this large set that's harvested by these methods, which will itself not contain many pages that are in fact contain these strings. The filtering companies will use their own software that will do some analysis on these texts that are returned. It may involve just key word searching as in Judge Bartle's example of just, give me all the pages that contain sex, or it maybe a bunch of 15 words or 30 words or 50 words.

JUDGE BECKER: Are we into winnowing?

THE WITNESS: We're into winnowing now.

JUDGE BECKER: Okay.

THE WITNESS: Because we want to take this large set that we've come back with which will contain many pages that are doubtless completely innocuous and restricted further.

So it may also use statistical methods.

JUDGE BECKER: Well, how would a key word search help to winnow?

THE WITNESS: Well if, for example, I've given the—I've got my original set of pages, and now I say, well, give me back only the pages that have the word cum and anal sex and whatever, some combination of six of these words or something like that, and just take that subset and those will be the candidates for further—

JUDGE BARTLE: Because theoretically it would return the word, Middlesex or something.

THE WITNESS: It might return the word, Middlesex, or certainly if you've searched on—

JUDGE BARTLE: Or if the site was hotstripper and it turned out it was a furniture refinishing company—

THE WITNESS: Right. In fact there's a one case that we have in our documents of a site—

JUDGE BARTLE: That's why I picked it up.

THE WITNESS: —a site called pen—well, It's the pen is mightier than the sword, is the name of the site, but the URL is just penismightier—

JUDGE BECKER: So it's penis—

THE WITNESS: Yeah, and it has the string penis in it. Since there's nothing else in this site, it's a site where discuss games and it's hard to find anything else in the site except some mild profanity that would trigger the classification for pornography. So—

JUDGE BECKER: All right. Or on hotstripper the keyword would show nothing by furnishing refinishing. It wouldn't have any other key—any—

THE WITNESS: Right. If that's the only stripper, perhaps—it depends how these things are—how this particular system is implemented.

JUDGE BECKER: Right.

THE WITNESS: But it could also use statistical techniques which in this case, for example, as I've said, there are 530,000 sites that contain a string, anal sex. And if you look at the first 2,000 of those, lots and lots of them are pornographic sites, not surprisingly.

If you restrict the search to unprotected anal sex, not surprisingly now the first sites that come up are—tend to be more safe sex sites of health sites than—since it's not a string. Some porn sites do use that string, not all, but that will tend to push things.

So I might say, well, anal sex, I want you to give a waiting of such and such unless it's proceeded by the word, unprotected, in which case, reduce the waiting by such and such depending—

JUDGE BECKER: Judge Fullam is ready to observe that up to now this is more like Computer Science 301 than rocket science, but anyway.

THE WITNESS: So these techniques are used to winnow the site. And all of these—these techniques are sometimes called—you sometimes see the terms, artificial intelligence or you hear talk of learning and so on and so forth. And I should just stress that these terms should be understood at best a metaphorical (inaudible).

You can build fairly sophisticated—we use them, certainly, statistical techniques that are capable of learning in the sense that they will assign certain waitings to certain words, and then when you give it correction it will adjust the waitings automatically and so on.

But these systems can't do, though the term artificial intelligence is often used in hype, these systems can't do what people ordinarily do. They can't say, oh, here's a word I wasn't thinking about and let's look at that word, or, oh, you know, when anal sex appears and the background is hot ink.

And so in the kind of generalization that people routinely make and the kind of gestalts that they routinely consult in making these classifications simply aren't available to this technology.

Moreover I should say—

JUDGE BECKER: But what is the—is the artificial intelligence different from the statistical method?

THE WITNESS: Well, artificial intelligence is a fancy name given to statistical methods that can automatically correct the waitings they give to certain features when they're evaluating the site—

JUDGE BECKER: All right. We're not into a modality here.

THE WITNESS: It's—but the terms—because a term is used and implies a kind of human-like capacity, it's important to understand that that's not the case.

Moreover I should say that these systems—when you look at a page, you're not looking at all the helping words or the order of words or so on, you're just looking at what we call a—

JUDGE BECKER: I would just observe, Mr. Wolfsohn, that if any of this is proprietary, you better be prepared to tell us what's proprietary.

MR. WOLFSOHN: I completely agree, Your Honor, none of this is.

JUDGE BECKER: Okay.

MR. WOLFSOHN: And I appreciate counsel, plaintiffs' counsel's caution and prudence.

JUDGE BECKER: All right. Well, we'll—

THE WITNESS: Okay. So having winnowed the set down again by some set of automatic methods, now the set of pages returned can be submitted for hand review. Of the filtering—

JUDGE BARTLE: When you say, hand reviewed, you mean by a human being?

THE WITNESS: By a human being. The filtering company is —

JUDGE BARTLE: Hopefully using one's head, not just one's hands.

THE WITNESS: Head review, I should say. In the depositions given by the filtering companies in this case, two of the filtering companies claim that all pages were hand reviewed that came out of this process. N2H2 admitted that certain of the pages were not—not all the pages were hand reviewed.

In fact, if you look at just the size of the web and the number of pages you're going to be dealing with even given the use of these processes, it's difficult to believe that anyone can submit all—subject all of them to hand review.

JUDGE BARTLE: But even if you could, there's certainly a subjective element when you're talking about a review by human beings as to whether it's, you know, explicitly sexual material, isn't there?

THE WITNESS: Yeah. Well—

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THE WITNESS: The depositions did say that review was done occasionally of the decisions made by individual reviewers, but the individual reviewer, as I understand the depositions in each case, when documents are reviewed by hand—by eye, by whatever, each reviewer is responsible to do a certain set of web pages and there may be controls and supervisors looking over how these people do this.

They have had varying degrees of training ranging in one case for three days, to perhaps several weeks training.

JUDGE FULLAM: Could you give an idea of approximately the number of pages that would be hand reviewed?

THE WITNESS: Do you mean how many pages by one person in a day or how many pages—

JUDGE FULLAM: Total.

THE WITNESS: Well, the filtering companies claim —two of the filtering companies who were deposed claimed that nothing appears on their control list except when it's been hand reviewed, subject to certain other reservations that I'll come to in the fourth step.

JUDGE FULLAM: I'm trying to find out how much they reviewed before they wound up with their control list. What number of pages are being reviewed?

THE WITNESS: It's difficult to say.

JUDGE BARTLE: It would depend on what the subject was, how much raw material there is out there, wouldn't it?

THE WITNESS: They're getting these pages back and then they're giving them by their own account two reviewers who are going over them and making the final judgment according to the categories that they have, which are different from one filtering company to the next.

JUDGE FULLAM: And you have no idea whether it's 25 or 25,000 or 25 million?

THE WITNESS: Well, the filtering companies claim anywhere between I think 200,000 and 600,000 pages or URLs on their control list.

JUDGE FULLAM: That answers my question. Thank you.

THE WITNESS: Some number in that range.

JUDGE FULLAM: Okay.

BY MR. SMITH:

Q Now—go ahead.

A So the other point to make about hand review is that when you look at what the companies—what actually appears on the control lists, it's just difficult to believe that these pages have been reviewed by anybody. I guess we'll come to that later.

Q Did we have access to the actual control lists?

A No. And the control lists, as I understand, are held to be proprietary by the filtering company, so we have no way of getting them.

Q So when you refer to looking at what shows up on the control lists, can you explain how you did that?

A If I, let's say, want to find out if Miss September's picture is on the N2H2 control list, there is a site at N2H2, so I could do one of two things. I could actually load the software in my machine and see what it does, or N2H2 makes available at its home page a page in which you can enter a URL, an address, and it will tell you how that page is classified by the N2H2 classified

similarly of the other two filtering companies who were deposed.

Q Okay. Now, just for clarity—

JUDGE BECKER: Can I do that? Can anybody do that or do you have to have a key word or something, a password?

THE WITNESS: No. No, anybody can just go there.

BY MR. SMITH:

Q For clarity, is this a constantly updated process, this control list development?

A My understanding, again from the depositions, is that the companies are continuing to harvest pages and continuing to winnow pages. They do not, as in their depositions, they indicate they do not routinely go back and look at URLs again to see if content has changed, and content changes very rapidly, unless a request is specifically made by somebody for them to review a classification.

So the classification, once made in the default, remains as such.

Q And is the list periodically redistributed to their clients of the company?

A Again, as per the depositions, the list may be in several places. It may be at a server in the library that served all of its stations, or it may be at individual PCs and it is periodically updated.

But it's going to be updated—you have to understand, this process takes a while to compile these lists.

Meanwhile, the search engines like Google are going out and very rapidly updating their indexes. So it may be weeks or even months before a new site, even if it does make it through this process, finds its way to the control list of one of the filtering companies.

That period of several months is, in this world of sexually explicit sites, a very long time.

JUDGE BARTLE: So in other words, if it's reviewed as of say September 1st, sexually explicit material, and that's—whatever is blocked is blocked, then of course there's changes occurring every day on the web sites and it's not reviewed again for a number of months—

THE WITNESS: In the default case, it will never be reviewed.

JUDGE BARTLE: —so in October and November, the world has changed in that period of time?

THE WITNESS: Right. To take the trivial we're talking about, when Miss October appears, let's say on October 1st—

JUDGE BARTLE: That won't be blocked because that hadn't even —

THE WITNESS: —it may not be until January or February if it's found at all, because it has to make its way through this process.

JUDGE BARTLE: —because that didn't even exist in September.

JUDGE BECKER: But, of course, if they block the over Playboy site, then they block—

JUDGE BARTLE: Exactly.

JUDGE BARTLE: —some good articles that people are entitled to get.

JUDGE BECKER: Right.

THE WITNESS: What happens in this fourth category, categorization by association—

BY MR. SMITH:

Q Well, why don't we ask you about that? What is that?

A In having identified certain pages, and let's say it's sexually explicit, now certain generalizations will be made. And one of them, for example, would be the case of inheritance blocking, what we called inheritance blocking.

This is the case where having identified, for example, that here's this site, missseptember,—here's this page that ends missseptember.html, it's sexually explicit, let's block everything at the root URL, that is to say www.playboy.com. Each of the filtering companies that were deposed in this matter, for example, does block everything at playboy.com, including interviews with Jimmy Carter, film reviews and the like.

JUDGE FULLAM: Well, he lusted after women, as I recall.

JUDGE BARTLE: Only in his heart.

MR. SMITH: You have to be a certain age to even remember that at this point, Your Honor.

JUDGE BARTLE: We're all at that age.

JUDGE BECKER: Well, I won't repeat that Mr. Smith comes from Washington and he would be expected to know that. I wouldn't do that—

THE WITNESS: So in this categorization by association, from the occurrence—and in the case of the depositions—I now have to refer to my own report, I can't remember which of the filtering companies it was that claimed at its deposition that the existence of a single sexually explicit page at a site was sufficient to block the entire site.

JUDGE BARTLE: Maybe that ought to be called by guilt by association.

THE WITNESS: Possibly, Your Honor. I'll let Your Honor decide.

BY MR. SMITH:

Q Okay. Have you completed your description of the four steps that they go through?

A Right, yes.

Q Okay. At this point, I would just like—

JUDGE BECKER: Can tell me again, categorization by association. I'm not quite—

THE WITNESS: That's the case where you say, okay, here with missseptember.h—or here was www.playboy.com/missseptember.html, rather than looking at every page in this site, we're just going to assume that given the presence of this picture in that site—

JUDGE BECKER: I see, okay.

THE WITNESS: —everything at the whole site is going to be blocked.

And there are others, they might also generalize it not just for the www.playboy.com, but to the server that contains, which would block—

JUDGE BECKER: All right.

JUDGE FULLAM: A recipe for over-blocking in other words?

THE WITNESS: Yes.

JUDGE BARTLE: So in other words, if they decide to block the Star Report, then I can say maybe everything emanating from the Government ought to be blocked?

JUDGE BECKER: The Kenneth Star Report.

THE WITNESS: Yes, I know. For example, that would be it, that would be a possibility.

JUDGE BECKER: Yeah, just as a more recent example than the Jimmy Carter example.

THE WITNESS: Well, that's an extreme, obviously it's extreme. But there are cases, for example, N2H2, in its deposition, admitted to blocking the entire site I mentioned, www.salon.com, it's an online magazine most of whose—all of the content of which is certainly, by any definition, protected speech. It's got a sex feature which contains slightly ribald stories but without profanity, none of which couldn't appear in Harpers or the Atlantic.

I mean they are mainstream, well-known journalists who write for it. The entire site is blocked because evidently, according to the depositions, there were complaints about some of the features that appeared in the sex column.

So there is routinely massive over-blocking that results from this generalization process.

BY MR. SMITH:

Q Number four on the list there, is that something —the software companies?

A They all do it, and its given the amount of content available and the amount that keeps coming on and the resources available to the filtering companies. There is no conceivable way to even try to undertake to block this content without this kind of over generalization.

JUDGE BARTLE: Well, then theoretically if you take that categorization when we were involved in the saga of recent years, there were certain articles in newspapers that one could argue were maybe sexually explicit material, and so then you could have blocked the whole New York Times and the Washington Post, I mean if you had taken that literally?

THE WITNESS: That would have been at the discretion of the filtering company.

JUDGE FULLAM: Do you think that they tend to draw a distinction between text and photographs?

THE WITNESS: One of the companies, N2H2, has specific text only property I think or category to which applies to some of the—I think to their pornography or

sexually explicit category. The other two don't have any such category.

BY MR. SMITH:

Q Did the companies whose depositions you reviewed use image recognition software in any way?

A None of the three companies that depositions were taken in this case used image recognition software. I think all of them indicated that it was deficient now for these purposes. There is—

Q Let me interrupt you.

A Yes.

Q What exactly is image recognition?

A Image recognition software is software which rather than trying to identify let's say sexually explicit text, looks at images itself in the effort, in this case to identify sexually explicit images, although of course image recognition could be again just a case of—you could just be looking for pictures of dogs and, in fact, that's one of the test beds in terms of which the software has been developed.

At this stage of development extremely primitive. There is a company—there was at least one company in New York State that was marketing a product that claimed to be able to detect pornographic images, but if you understand the way the software works, you see it's extremely difficult to do this.

Right now what the software tries to do is to identify naked flesh, skin regions by looking at color tempera-

ture and reflectivity of areas on the screen. It does that with fair performance, which is to say perhaps 60, 70 percent precision in the best case.

That means that lots of things that aren't, in fact, naked flesh from sunsets—I was playing with one of these that we have at Stanford, and I started getting pictures of tapioca pudding, then it continued to classify this stuff as pornographic.

Even if it can identify naked flesh, it can't tell so it massively over-blocks so to speak. Even when it can identify naked flesh, it can't identify flesh that, for example, is—if it's in black and white it can't do anything with it. If it's taken under an odd light, a red colored light for instance, it can't do anything with it.

It can't tell the difference between a painting of Saint Sebastian—again, this is on the basis of my experiments with the Stanford—with the state of art system that my colleagues at Stanford had developed, it can't tell the difference between the paintings of Saint Sebastian and a pornographic image or for that matter, just a picture of a swimmer, Mark Spitz and a pornographic image.

It can't tell men from women. It certainly couldn't begin to tell adults from children.

Q So at this point, image —

A At this point, it's just beyond—there's no possibility that could be used with any level of tolerance.

Q Okay. Now, returning again to the more text base software that—

A Right.

Q —you analyzed and whose depositions were taken, do you have an opinion about the ability of these four steps in this methodology to identify and categorize enough content on the web to avoid a great amount of under-blocking?

A No. There's inevitably going to be substantial amounts of under-blocking because each of the procedures here are subject to—is limited in what it can return.

But one thing, to take it from where we started, the publicly indexable web isn't the whole web. There's lots of content out there that even the search engines don't know about.

If the search engines do know about it, you're only going to get back a part of it when you give them your query, and when you try to follow links that follow other content, it turns out that like chain letters in a way they tend to converge rather than diverging. At a certain point you have reached a large number of sites.

So the harvesting process itself is limited to only a small proportion of the actual sexually explicit content that's available there.

The winnowing process is subject to the considerations of precision and recall that I mentioned earlier. If you set the—if you make the hole very wide, you're going to let lots of unacceptable stuff—lots of stuff through that shouldn't be blocked. If you set it narrowly, you're going to miss other material.

The review process is itself subject to various considerations that we've talked about, and then the guilt by association or categorization by association that is going to lead to over-blocking rather than under-blocking, so I—

Q Okay. Now, what about the argument that while it may not be perfect it's sufficient to identify those sites that a person is likely to encounter in every day use of the internet in the library or in their home?

A There are several points to make there. First of all, as I mentioned earlier, there's lot of sexually explicit content that it can be easily obtained.

I get invitations two or three times a day now since I put my—foolishly my address up on—my e-mail address up on a web site to visit sexually explicit content, which since I've been working this case, I check routinely. They are almost never at the search engines, the ones that—

Q Get you through the e-mail.

A —get me through the e-mail. So there's lot of ways to get the content.

THE WITNESS: I can't speak as an expert on the economics of pornography, Your Honor, but I mean when you go to these sites, there will be a bunch of sexually explicit pictures perhaps—

THE COURT: But you're not paying?

THE WITNESS: —you can click here for more. You won't pay to see the top level or maybe a few pages and then you—

BY MR. SMITH:

Q Are there some sites where you do have to give them a credit card number?

A There are plenty of sites that want you to give them a credit card number to get in. I haven't gone to that.

Q You're not an expert on this subject.

A I don't know what happens when you give them a credit card.

Q Are there sites that have advertising that they flash?

A There's some that have advertising, there's some that also serve as links to other sites, so there's lots of —can you repeat the last question?

Q Okay. You were talking about why it is that it's not sufficient to get to the sites that most people would encounter in their every day use of the—

A Right. The second point to bear in mind about pornographic sites in particular, adult sites but sexually explicit sites in particular, is that they have a very interesting and distinct pattern of use with them.

* * * * *

[TESTIMONY OF J. NUNBERG]

[March 26, 2002]
[pp. 5-47]

JUDGE BECKER: Is that because of the inability to count or because what you described yesterday as the dynamic nature of the web, all the new pages everyday?

THE WITNESS: It's both of them. It's very difficult just to know how big the web is, how much material there is out there. There's no reason to suppose that any of these filters block more than a small part of it, and the reason for that is that none of the search engines themselves index more than a small part of the web.

A recent article in science it was estimated that the best search engine index is only 16 percent of the indexable web, that is to say the web it could in theory find and that all of them taken together only find 50 percent of it.

BY MR. SMITH:

Q But if you came to the conclusion that the filter was blocking 90 or 95 percent of the sexually explicit sites that patrons actually tried to access, what would be the practical significance of that?

A Well, that's the sort of claim that you see in the advertising for filter companies, but I think you have to take it in context.

To hear that there are 100,000 sexually explicit sites on the web can be a dramatic and alarming figure, and

it certainly is an awful lot. But reducing that even by 90 or 95 percent isn't equivalent to say reducing the number of dirty book stores in a jurisdiction by 90 or 95 percent where you might in that case assume that you had in some measure also reduced the access to this kind of material that people in the jurisdiction can have.

It's rather more like having 100 cable stations in a region and then reducing the number to ten. You reduce the amount of variety that people have but you probably wouldn't reduce t.v. viewership because any site is accessible to anyone. That's the first point. So, even if you've reduced it by 90 percent, there's still more than enough for people who want to find it to get it.

Moreover, I recall that yesterday we were talking about the special the unusual properties of these sites with regard to the kinds of surfing behavior we see where unlike a new site where somebody goes to one side gets the news, that's it for the day, people will go to one side and then another site, and then another site, they'll keep clicking until they can find something. If things are blocked, they'll continue to look for things until they can find things that aren't blocked because of the nature of the appetite for this kind of material.

One other point I should make about that. One percent figure of one percent of porn sites, you have to understand that given the behavior of people who are looking for this kind of material that one percent of porn sites doesn't translate into one percent of the web surfing public who have an interest in this because a relatively small number of people with this appetite can support a far larger number of sexually explicit sites

than the equivalent number of people with an interest in horses or baseball or news or something like that.

JUDGE BECKER: Would you explain that answer again, I'm not sure I understand. You're talking about the appetite of proclivities of these folks?

THE WITNESS: Well, because the tendency for people who are interested in this kind of material to keep looking for more sites. I mean, unlike a news site you get your news then you go home. In this case you get some pornography, you get some more pornography and so forth.

So a relatively small number of people can support a relatively large number of sites in that sense. And the one—if one percent of the sites on the web traffic in sexually explicit material that doesn't mean that one percent of the people who are browsing the web are interested in that material. It's just a caution against interpreting the proportion of sexually explicit sites into a proportion web browsing public.

BY MR. SMITH:

Q Let me then turn to the issue of precision or

over-blocking and ask you again with respect to the same four step process that the filtering companies use. Does that in your opinion allow them to achieve a high degree of precision in terms of the accuracy of the sorting that they do of sexually explicit sites?

A No, because at each one of these states a certain number of sites that ought not to be blocked are going to necessarily leak through the process. We already saw that in the harvesting process which uses very

basic key word searches enormous numbers of sites are going to be brought in that shouldn't properly belong on the list.

Q In the winnowing process similarly which uses other kinds of either key word or statistical methods again many more sites will be brought in then should be tagged.

At the review process if there is hand review of all of many of the sites, here again I think we'll come to that soon, there are various ways in which people are going to over label sites. Like there will be a tendency to label sites more often than—sites that ought not to be properly labeled, and then of course the categorization by association is necessarily going to include a lot more content and we'll come to that as well.

One other thing I should say is that even if the filters perform 100 percent of identifying all and only the sites that were on their categories, there would nonetheless be over-blocking, and the reason for that is that the categories that the filtering companies are using are defined byu the filtering companies in varying ways. Sometimes sexually explicit adults, sometimes sex, sometimes pornography but are always defined in ways that are broader then the categories specified in CIPA.

Q Okay. Now, Dr. Nunberg, you identified in your report did you not various categories of over-blocking, sources of over-blocking and I want to take you through each of those.

Referring to the chart that we've put up here what is automatic or automated classification errors, what is that as a source of over-blocking?

A Well, that simply refers to errors that are introduced when a site is classified as belonging to one of these suspect categories, sex or pornography or whatever the case may be on the basis of an automatic classifier that's looking simply at key words of at some statistical counting, but that doesn't properly belong in that category.

* * * * *

BY MR. SMITH:

Q Did you with respect to these categories of sources of over-blocking make an effort to identify some examples that you found?

A Right in each of these cases I went to various filters to try to find examples of the kinds of over-blocking involved. I should say two things, first of all that in as mush as the filtering companies don't announce why they've blocked this site, or as to what process they've blocked the site these are only hypotheses as to why just certain sites were blocked.

Second of all, what I was doing here was merely trying to find sites of cases f over-blocking that were illustrative or diagnostic of what I took to be the deficiencies of these systems on the basis of an examination of how they worked.

Q Okay.

JUDGE BECKER: Dr. Nunberg. how may hours did you spend in this investigation preparatory to this testimony? I mean was this something that you did in a half an hour, an hour or so, did you spend days at it?

THE WITNESS: No, it was a couple hours. I would say I looked at—let me tell you how I did some of these. For example if I thought that a system might be using key word searching, then you would say well this example I gave yesterday of unprotected anal sex, if they're just pulling up all the pages that have anal sex what I'll do is I'll give a query unprotected anal sex because on that—to that query I'll get a lot of pages that are health pages or say sex pages, and I'll feed those to the filter and if it starts blocking those I'll say ah-ha, I'll bet that's what's going on.

JUDGE BECKER: All right. We look at this statute that we're concerned about, it talks about blocking visual depictions. Now, how does a blocking system block out simply visual depictions? In other words let's assume there are no words with the picture. How can a blocking system determine that that fits under the definition of the statute as something that's obscene.

THE WITNESS: It can't.

JUDGE BECKER: How do you do that?

THE WITNESS: It can't none of the systems—

JUDGE BECKER: It's one thing if you're looking for a word.

THE WITNESS: None of the systems being considered here and almost none of the systems commercially available even make an effort to identify images as such.

JUDGE BECKER: But that's what we're talking about here.

THE WITNESS: Right.

JUDGE BECKER: We're not talking about just an article that uses the words anal sex for example, we're using depiction and if you have something that has no words, and that's what the statute is directed toward how in the world can it be blocked?

THE WITNESS: The only way I take it that people hope to do it is to locate pages that have this sort of suspect text on it and then block all the images on that page or block the page because it contains the text and on the assumption that the images—

JUDGE BECKER: But if you don't have words then you're home free.

THE WITNESS: If you don't have words you're home free, if your words are in a language that the filter companies aren't searching on you're home free. If you're words are in english and they're represented as an image rather than a text, that is to say if you have so to speak a painting of the words on the page which is something that frequently done you're home free because that also doesn't show up—

JUDGE BECKER: Yes, you—

THE WITNESS: —to the search I do.

JUDGE BECKER: —could just say here's some great art.

THE WITNESS: Well, that, or you could just take rather then saying porn sex, whatever, you could actually paint so to speak the words, you can take a picture of the words porn sex and represent it not as

characters but just as little pixels just as little dots that represent the—

BY MR. SMITH:

Q The search engine wouldn't be able to read that?

A No, and this is actually something that's frequently done, people do it, companies do it all the time for example when they want to conceal their e-mail addresses. You can put an e-mail address on the web but rather than putting it down as text in which case an engine will find it, you put it down as an image just as so to speak a photograph of the text, and then the search engine—

JUDGE BECKER: And another—

THE WITNESS: —doesn't find it.

JUDGE BECKER: Another issues that concerns me that you haven't talked about is you're assuming that a definition remains static and these words that are in these statutes are subject to Court interpretation and you may have one Court in Philadelphia interpreting the word one way, and a Court in California a different way so how would you—you not only have new pages added to the web everyday, and changes, but you may have Court's interpreting these words differently and that's the definition, so you sort of have a moving target don't you in terms of what the words mean?

THE WITNESS: Yes—

JUDGE BECKER: I mean it's not like saying some words have very definitive definitions and no body will dispute it, but when you come to obscenity child porno-

graphy and what's harmful to minors even with the definitions in the statutes they're to some extent moving targets, aren't they?

THE WITNESS: Yes, but even if they weren't the technology now is at a point where even identifying a category like pornography or explicit sexual content or representations of sex is well beyond the capacity of the technology.

To imagine that this technology now, or ever would be in a position to look even at a text and say this in the judgment of the average person appeals to all and largely in part to a puree at interest, I mean to make a judgment of that sort is just an absurd requirement to place on the technology. It's just beyond the capacity—

JUDGE BECKER: Or like Justice Stewart —

THE WITNESS: — of the technology.

JUDGE BECKER: —didn't he say, I don't know how to define it, but I know it when I see it.

THE WITNESS: And this technology can't see it.

JUDGE BECKER: Okay. Go ahead, Mr. Smith.

BY MR. SMITH:

Q Just for clarification, Dr. Nunberg the two hours you spent was on the looking for the examples that—

A Yes, two or three, I mean I would say two or three or four hours, several hours I spent looking for sites and just using these rough euristics (ph) to pull down sites and test them. I must have I would say I pulled down 250 to 300 sites in the course of looking for

sites that would illustrate the various deficiencies of the search engines, of the filters.

Q I take it you spent considerably more time writing your 86 page expert report?

A Yes.

MR. SMITH: Now, we're going to be working with exhibits starting with Exhibit 73, Your Honors, which is all in volume four. Could you turn to Plaintiff's Exhibit 73, Dr. Nunberg and tell us, does that represent an example of what you believe is an automatic classification error in over-blocking?

A Right, this in fact was a site that someone had sent to me just as a joke someone had sent me the URL for this site and because I knew about it I ran it through the pages at the home—at the sites of the various filtering companies to see how they dealt with this site.

What it is in fact, it's called Kittyporn.

Q K-I-T-T-Y.

A Kitty, yes, as in pronounced K-I-T-T-Y and it's a spoof site protesting that 2000 times a day pictures of naked cats are posted on the internet and each day it is estimated as many as 20 pictures of young cats go up on the internet without their knowledge or consent with a computer and phone line even children can easily find and view these picturers a frightening new trend and so forth, and then there are pictures of kittens some of them bound in yarn and so on.

Q And what is the first page of Exhibit 73?

A The first page if Exhibit 73 is the print out which is time dated and stamped, of the response of the Smart Filter product when it was handed this URL.

So I went to the Smart Filter site, I gave it the URL for this particular page and it responded that the page was currently categorized as sex. This is as of October 1st, 2001 when I did this study.

JUDGE FULLAM: Excuse me, what? The first page of Exhibt 73 you say is dated and stamped, where is it?

THE WITNESS: Oh, I'm sorry, I printed it out at the top, if you look at the upper right, as of Monday October 1st at the time at which I printed this out. On the very upper right, the heading of the first page.

JUDGE FULLAM: All right. Okay.

BY MR. SMITH:

Q So all of this work you did with respect to examples is work that shows what was blocked as of about—

A As of that date—

Q —the 1st?

A —I have no way of knowing whether this is still blocked and so forth, but this page is blocked as sex from Smart Filter.

Now, my assumption is that no human reviewer would have looked at this page which is manifestly a spoof and classified it as sex. It could be of course that's it's blocked—so the question is why have they

blocked this as sex. Did a human reviewer make an error or make a decision about it? That's just not likely.

Could it have been that it inherited it's classification from the root URL, the site to which it belongs? No, because when you look at just that corporation .com, that has another classification, not sex.

So my assumption is that an automatic process just went through saw these words porn and so forth and classified it as sex without anyone's going over it and checking it.

Q Okay. How about Exhibit 74, is that another example?

A Right, this is a site that was classified by N2H2 in it's URL checker, the checker it makes available on it's web page to find the classification of various sites as adults only and pornography.

What the site is in fact is the home page of the Center For Sex For Search at the College of Social and Behavioral Sciences, of California State University Northridge. This is an academic research group in sex. It's patently not there's nothing pornographic about this site, but again my assumption is that this had to have happen because an automatic classifier saw the word sex and whatever else might be on this sexuality or so forth classified it as pornography and no one reviewed it.

Why do I assume in this case it was a case of inheriting the classification from the root note, because the root note is the home page of the California State

University of Northridge and that is not classified as pornography.

Q Okay. I believe —

JUDGE FULLAM: Just — I'm sure that the answers obvious to everyone but me, but if these sites were blocked how did you get the content?

THE WITNESS: I wasn't using the filter at the time.

JUDGE FULLAM: I see.

THE WITNESS: What I was doing rather was using an unfiltered browser to pick up the pages, then taking the URL and giving it to this page that's made available—

JUDGE FULLAM: Filter, I see okay.

THE WITNESS: — at N2H2 which then tells you what there classification of the site is?

BY MR. SMITH:

Q So in each case you've combined the answer about what is categorized. That's the first page of the exhibt with an actual image—

A Right, right—

Q — of the—

A —I should have said that.

Q — web site.

Now, I believe you touched a little on Exhibit 75 yesterday, this is the penismightier site, can you tell us

why you concluded this was another example of automatic misclassification?

A Well, here again, this is a site that it's a kind of chat site or devoted to devotees of video games and electronic games in which they exchange e-mail, and so forth. There is some vaguely ribald language in this, but no content that could be remotely judged as sex or pornographic. There some people use the words ass and so on and it's classified by N2H2 as indicted on the second page of the exhibit as pornography and by Smart Filter as sex.

The only reason I could assume that I could imagine for that is that the URL for the site which is penis mightier, contains the string penis, P-E-N-I-S and that that was the reason for the misclassification, now the word ass appears on the second page, it could have been that but whatever the reason for the misclassification here again I have to assume that no human reviewer could possibly have looked at this site and decided that this was an instance of either sex as Smart Filter defines it, or pornography as N2H2 defines it, that rather this was a mistake just an error in machine classification which passed trough without anybody checking it.

Q Okay. And let me ask you them to turn over to Exhibit 80, and can you tell us what you determined about his example?

A This was a particularly disturbing example for me maybe because I'm the parent of a teenage girl.

JUDGE FULLAM: I'm sorry, which one are you looking at?

THE WITNESS: I'm — is this —

JUDGE FULLAM: Eight zero.

MR. SMITH: Eight zero should be opposite of sex.

THE WITNESS: Oh, I'm sorry, no I have 79, you're right. Yes. This seems to me a pretty patent example of machine misclassification.

It's the home page of the movie The Opposite of Sex, which was a major Sony Pictures film that came out a few years ago. I did check the rating, it was an R rated film, but it was an, in general, theatrical release. It was classified, this page, by N2H2 as pornography.

Again, it's inconceivable to me that anyone could have gone and looked at this page and decided that this was pornographic, and so that it must have been an example of machine misclassification.

I suppose it's possible somebody racing through at high speed would see a picture of this woman wearing a bathing suit and lying on a couch and say, well, that's pornography and so on. But my assumption here is that was machine misclassification.

Q Okay. The second category you've listed on the chart is over-zealousness. Can you tell us what that is?

A Over-zealousness is what happens when someone does look at a site or a page, and isn't sure how to classify it and errs on the side of caution, a phrase that came up several times in the depositions of the filter companies, says, well, it might be that some of our customers would be upset at seeing this material.

So rather than let it pass, even though it's really not in that category, we'll flag it as pornographic or sex or whatever as the case may be.

Q Okay. And turning to Exhibit 70—

JUDGE BECKER: It's not really over-zealousness, is it? It's over-assiduousness or something. You're not suggesting that there's a—

THE WITNESS: CYA would be the phrase that some people would use.

JUDGE BECKER: Okay. Well, that's an acronym we all understand.

MR. SMITH: We won't need to put that on the glossary?

JUDGE BECKER: You don't put that in the glossary.

JUDGE BARTLE: Christian Youth Association.

BY MR. SMITH:

Q Turning to Exhibit 77, is that an example of the second category then?

Unlike everybody else, you don't have a binder, I'm afraid.

A Right.

(Pause in proceedings.)

JUDGE BECKER: We can loan him a binder if that will speed it up.

THE WITNESS: Here we go, I got it.

Right. This is the text of a little piece, a little commentary I suppose you would call it, that appeared in the site salon.com. In the column of the site, the feature of the site that's called sex, it's typical of the features that appear in that particular column. It's written by David Thompson, who is a very well-known film historian and novelist, and was a best-selling novelist at one point.

The story is—I suppose you could say it's ribald, there are no profane words and certainly no pictures associated with it and no photographs associated with it, in which the writer and his partner discuss whether Bush or Gore is sexier, whether it's sexier to speak in full sentences or sentence fragments.

It's clearly intended as a ribald piece, and again, the sort of thing that would easily appear in Harper's or the Atlantic or—I should say that this was categorized by N2H2 as pornography, and by Smart Filter as sex. In both cases, my assumption is that this was caused by somebody's over- zealousness, seeing something appear or—seeing something appear in a feature that's called sex and merely blocking everything in that feature.

I should also note that one hypothesis could have been that N2H2 blocked this because they block everything at salon.com, which is a general online magazine that includes articles by the likes of Orville Shell and Arthur Schlessinger and so on. That's all blocked.

But it's blocked under another category, it's not blocked under the pornography category. So my assumption is that in the case of the particular page, somebody at N2H2 went and looked at this page and said this is pornography and should be blocked.

BY MR. SMITH:

Q What is the N2H2 category under which the blocked the rest of salon.com?

A I think it's sex.

Q Is that like—

A I would have to look at my—

Q Okay. Now Exhibit 79, is that another example you would site of over-assiduousness?

A Right. This is the one that I said was particularly troubling. This is a very good site that's put up by Planned Parenthood, Ask the Experts Teen Wire. It's a sex advice site for teenagers. It's well-written, informative, and so forth, and exactly the sort of resource that the web has made very useful.

But one of the wonderful things about the web is that kids who may be timid about asking advice about these matters from parents or guardians or teachers, can now go on the web and get information about topics like this. This came up, in fact, because anal sex is mentioned on this page and it makes the point of the importance of using protection during anal sex, again, in terms that a teenager might understand.

It is blocked by Surf Control as adult sexually explicit, and it's blocked by N2H2 as sex, or it's categorized by N2H2 as sex, which is one of the categories that N2H2 on its home page advises should be activated in order to conform with the CIPA Act.

So an adolescent in a library who wanted access to this page in which—working in a library in which either Surf Control or N2H2 was activated, would not be able to get access to this page, nor, I should say to another example that was in my report that is not here, on another very good teen sex advice site that's sponsored by a group at Rutgers University.

Q Okay. Now what is the third category, inheritance? I think you've already talked about, but just for the record.

A Inheritance is the case we talked about in which rather than blocking Miss September, Miss October and so on, the filtering company just says, well, we're just going to block everything at this site, whether it's Playboy or salon.com or a sexually explicit site.

And this necessarily introduces very—a large number of over-blocking errors since people haven't checked all of the pages of these sites. And many, many times, in the case of Salon, there's nothing at this site that should be so categorized; in the case of Playboy, a large amount of content that shouldn't be categorized in this way.

Q If you could refer to Exhibit 71, is that an example of category three?

A Right. 71 is a page that happens to be a block by all three of the filters I looked at. It's classified by Surf Control as adult sexually explicit. It's classified by N2H2 as adults only and sex. And it's classified by Smart Filter as sex.

What it is is the text of a study that was published as a book called—it's the home page of this text, or the top level page—M as for mutual, A as for Ax, Male Sex Work and AIDS in Canada. It reports a study that, as described on the first page of the printout of the web page, was co-published by Health Canada, AIDS Vancouver, the HIV Social Behavioral and Epidemiological Studies Unit of the Faculty of Medicine at the University of Toronto.

The page was—so it's clearly a serious report and one that should be made accessible to users. It was placed, however, on the site of the Sex Workers Alliance of Vancouver. Now, the Sex Workers Alliance of Vancouver is, again, a serious site, dedicated to social and health issues involving sex workers.

It does, however, contain—while it contains itself no sexually explicit content, it contains in other pages links to pages that have sexually explicit content. My assumption here is that this particular text was blocked because this entire site, Sex Workers of Vancouver's site, was placed on the control list of all three of these companies who didn't bother to look through all of the pages to see, well, there's this piece of content that certainly shouldn't be blocked.

Q Just one more example, refer to Exhibit 72 and tell us what your analysis there was?

A This is a site that was blocked—this is a page, I should say, that was blocked by N2H2 as adults only pornography, and it does add text spoken only, and was classified by Surf Control as adult sexually explicit.

What the page itself actually contains is an open letter to Senator Hatch asking Senator Hatch to reconsider Section 1402 of the Juvenile Justice Bill which, according to the letter, is unlikely to withstand first amendment scrutiny. This is a clause that I take as the ancestor of the clause that made it into the CIPA provision mandating the use of filters.

Clearly, not by any stretch of the imagination, is there any content in this particular page that would be either sexually explicit or pornography. The reason it appears on the control list of these companies is that the particular site in which it appears is one that's dedicated to, in its own terms, erotic education, I think was the phrase, and contains a good deal of textual erotic material but no sexually explicit depictions.

Q Now the fourth category is listed as IP address over-blocking. Can you tell us what you mean by that?

A Right. IP address over-blocking is what happens when, in addition to blocking the root level URL of a site, that is to say the whole site, the filtering company also blocks the IP address. That is to say that four numeral sequence that's associated with the server or host at which the site is located.

This is done, as I suggested, because people could just enter the IP address rather than entering the URL. But it's very often the case that a single IP address or a single host will, in fact, be the host to a number of different sites, one of which might be a sexually explicit site but many of which might not be sexually explicit sites. And they will inherit this classification unless somebody explicitly goes in and

changes the classification. They will inherit this classification and their sites will be blocked.

Again, it's kind of collateral damage of the fact that these same computers host one site that's sexually explicit.

Q And is this a relatively common problem with the filtering companies?

A In the submissions from one of the filtering companies, we received logs of the various requests that the company had received to unblock or re-categorize sites. In the seven week period covered by these logs, there were 563 requests that the filter company classified as requests—these were granted, the re-categorizations that were made because the filtering company said that they had blocked the IP address and this had been a collateral casualty of that process.

So if it's happening at a rate of 50 a week, say, for one filtering company—and this is people who have actually noticed that their site is categorized in an inappropriate way and have taken the trouble to write to the filtering company and ask that it be revised.

My assumption is that if that's happening 50 times a week with one company, it's happening an awful lot.

Q Okay. Now the fifth category is loophole sites. Can you tell us what you mean by that?

A Loophole sites is a phrase used by some of the filtering companies, and other phrases are used as well, to refer to a particular class of sites that are very important on the internet.

These are sites that for one reason or another return a URL different from the URL you've entered. So normally if I enter www.playboy.com, that will pass through—that will pass through the filter and it will look and see www.playboy.com and block it.

There are certain circumstances, though, in which I might get a site, go to a site that will go off and get another set for me and return the URL not of the original site but of its own URL. So that is to say at least will return a URL different from—

JUDGE BECKER: Why does that happen?

THE WITNESS: Well, this happens in several cases. The first case is what are called anonymizer (ph) sites. These are sites that enable users to get access to a URL without revealing their own location, what computer they're going from. And there are lots of reasons for wanting that kind of anonymous access.

People might want to have access, for instance, to a politically sensitive site, which particularly has been an issue for foreign nationals living in the United States who may want to have access to a site in their home country that they fear may be monitored.

It might be the case that you're an employee of a company and you want to have access to a site without having someone know that, it's critical of the company, without having your employer know that you've gone there. There are lots of reasons for doing this.

The point is that because such anonymizer sites return a URL that's distinct from the URL of the site you've requested, the filtering companies just block

those sites categorically because the URLs that these sites return couldn't possibly be on their control list.

There are several other classes of these—

Q Loopholes?

A —loophole sites. A second is translation sites.

If I want, for instance if I'm interested in the text of an article about tropical diseases that was published in Latin American medical journals, let's say, and I've done a search either on the Latin name of a disease or maybe there's often an English language abstract, I might find an article written in Spanish and want to give it to one of these translation sites to translate for me.

Now, these translation software are something I've worked on, they're not that good, but they're often good enough to figure out, is this something I should pay more attention to or take the trouble to get translated in a serious way, or sometimes you're just interested in very simple information and you can get it from the translation.

But, again, what these sites do is, I'll give the URL of that Latin American medical journal to the translation site, it will go off, look at the site, produce a translation and return that site—that new site to me with its own URL, not with the original site. So, again, it changes the URL of the site I requested. It's also on the loophole list.

A third category of loophole sites are cache sites or archive sites. In particular, the Google archive. What Google does is to make a backup of every site that it

finds in the course of its indexing and store that as what's called a Google cache site.

And these sites are given new URLs.

JUDGE BECKER: What was the word you used, cash?

THE WITNESS: C-A-C-H-E, like —

JUDGE BECKER: Oh, cache.

THE WITNESS: Yes.

JUDGE BECKER: C-A-C-H-E, all right.

THE WITNESS: Or archive, we can say archive. It's just a kind of Google archive.

There's another one of these called the Internet Archive, it's a nonprofit in San Francisco that has I think now 10 billion web pages stored in this form.

JUDGE BECKER: How many?

THE WITNESS: Ten billion web pages are stored in this form.

This is crucial resource for anybody who uses the web routinely for resource—for research because these pages disappear so rapidly that if you want to find something that's been taken down, the only place to get it is from the Google cache file.

It might be a question, for example, of an article in a magazine that appeared in March and has since been taken down or is no longer available at this site. It might be a question of the home page.

This happened to me just yesterday, I was trying to find the home page of a company to get information about some electronic equipment I had and the company had gone out of business, so I couldn't get anything from the company site. But Google had cached a version, an older version of that site and I was able to get information about the product that they had put out that had since been taken down.

These, again, are always considered loophole sites and blocked or—if that category said, a block by all of the filters because you couldn't—the filters just wouldn't work if you could use these sites, although you couldn't just block the sexually explicit sites because people could use these to presumably get to the sexually explicit sites.

One other smaller category, but very important one, is the Google image—

JUDGE BECKER: Would you clarify that? Judge Fullam and I—

JUDGE FULLAM: You have spoken at great length and very rapidly, but it doesn't make any sense whatsoever.

THE WITNESS: I'm sorry. I speak to fast. My students are always complaining.

The idea is this, that these are different kinds of sites—

JUDGE BECKER: Just give us the general notion of, the umbrella definition of loophole.

THE WITNESS: Okay. A loophole site is simply a site that returns not a page that had the URL that you requested, but another page that has the same content, or in the case of a translation site, a translated version of the content—

JUDGE FULLAM: Now, which is the loop—

THE WITNESS: —that has a different URL.

JUDGE FULLAM: Which is the loophole site, the one that you requested or the one that you got?

THE WITNESS: No, the loophole site will be any site that's set up to do this. Any translation site is a loophole site. The Google cache site in this sense is—or any Google cache page would be an example of a loophole site.

The anonymizer site, or I should add also the Google Image Search. Google has a huge repertory or repository of images that are available. There are 11,000 pictures of the Eiffel Tower, for example, at Google if you're interested in such things.

I went to find—I had actually an image of myself that had appeared on my home page and I was looking in the Google Image file to see if it was there, and in fact, Google had backed up that image. And when I tried to bring it—when I gave the URL for that image to N2H2, it came back and said this is pornography.

And the reason it said that my image was pornography is because the URL associated with it had Google Image in the beginning, and N2H2 was just set up to just block anything that has that—

JUDGE BECKER: I don't understand. Sexually looking guy, is that the —

THE WITNESS: Evidently.

BY MR. SMITH:

Q But the basic concept is it's sites where you can get access to another web site that might be blocked but with a different address attached to it so that it doesn't get blocked?

A That's it. They just change the address of the site for one reason or another and return it to you with a new address. And since that address won't be on the control list, the filtering companies deal with these just in a categorical way and they block them all.

Q Okay. Now, how significant is this particular category of over-blocking?

A This is a huge category. I mean if you think about the amount of content to which access is blocked or impeded, it dwarfs everything else put together. The Google cache pages represent hundreds of millions of pages of content, some of which is available in no other form.

Content in languages other than English on the worldwide web, this is research I've done, is now at about 30 percent and growing much more rapidly than English content. No language represents—other language represents more than a small fraction of that.

So if I want access to all of the material in Spanish and Italian and French and German and Russian that's on the web, and I want to find out actually what it

means, the only way to do that is through the translation sites.

Q You can get the material, you just can't read it?

A No, I could get this Russian page, but it won't help me.

The anonymizer sites perform useful and sometimes critical functions, particularly in cases of, as I say, employees or foreign nationals and so on.

JUDGE BARTLE: Well, we have obviously a large Spanish population in this country where Spanish is the native language for these people. Do these blocking services take words which may have pornographic significance in English and get the Spanish equivalent and then search for articles in the Spanish language which should be blocked, or is it just English?

THE WITNESS: In the depositions—I can't speak to what all the companies do. In the depositions, one of the companies, Cyber Patrol—Surf Control, I guess, did indicate that they had out-sourced to other companies some identification of pages in other languages, classification of pages in other languages. And I don't know about the other companies.

But it's not going to cover the range of languages. Moreover—

JUDGE BECKER: We heard about the library, I believe it was in Wisconsin which has a lot of Norwegian documentation because a lot of Norwegian immigrants came to that part of our country I guess in the late 19th Century, early 20th Century. So I guess it wouldn't

take—it wouldn't deal with whatever is in the Norwegian—

THE WITNESS: You would have to reproduce the entire procedure for Norwegian and Swedish and so on.

Moreover, certain languages, a lot of the sexually explicit content comes from sites in Asia, and the languages of Asia present particular problems because they're not alphabetic. And for various technical reasons, it's extremely difficult to do these procedures on languages like Japanese and Korean and Chinese which just don't use alphabetic script.

JUDGE FULLAM: Does this mean that with respect to these foreign languages, it results in under-blocking or

over-blocking?

THE WITNESS: Well, depending, presumably—

JUDGE FULLAM: Speaking for myself.

THE WITNESS: —under-blocking.

JUDGE FULLAM: Under-blocking.

THE WITNESS: Presumably there's lots of content, let's say, in Chinese language web pages or Thailand.

JUDGE FULLAM: By and large, under-blocking is not a constitutional issue. Over-blocking is.

BY MR. SMITH:

Q Now, have you attempted to quantify the overall numerical precision rate of the various filter products that you looked at?

A No, I haven't. The—for a couple of reasons. In the first place, to do that properly, particularly if you don't have—I mean, the easiest way to do it is look at the control list, see what's on the control lists and classify that. But we can't get the control lists from the filtering companies, nor can we get direct access to the various procedures they use in compiling these lists, the search words and so forth.

Another way to do that would be to establish—to do a proper study with a stratified sample, but I estimate that that would require a huge number of web pages, 50 to 100,000 web pages to do it properly and I haven't done that.

More important, I think it's very—it's crucial to understand the precision and recall while those are the measures that we use in evaluating the performance of systems and appropriately relevant to certain goals, aren't going to be the crucial measures when what you're concerned with is the over-blocking of protected speech.

Q Okay. Now, if you were going to calculate a precision rate, what's the right way to do it? What is the formula that you would use?

A Well, let's say you had a number of sites that have been returned. In the example I used yesterday, you have a hundred pictures that a system has identified as

pictures of dogs in your database and, let's say, I forget the number I used yesterday, but 80 of them are, in fact, pictures of dogs.

Then you would take the total number that gets returned, take the proportion that were pictures of dogs and take that percentage in this case, then 80 percent.

Q What about the option of starting with a group of sites which you had identified that sites that shouldn't be blocked, running them through the filter and then calculation the percentage of these innocuous sites that are blocked or not blocked?

A So I would, in this case, take a hundred sites, say they were just randomly assembled that were innocuous sites and saw how many of them, in fact, were blocked by the builders?

Q Right. If you did that, what would be the significance of a finding that say only one percent of those sites were blocked?

A Well, there are two problems with that. The first is that you have to understand that none of the filtering companies have in their index, have in their control list more—or have looked at more than a tiny proportion of all the sites on the web.

So if I am randomly grabbing innocuous sites, the odds are that no filtering companies looked at it just because nobody looked at more than a tiny proportion of the sites on the web.

So if I looked at a hundred randomly chosen sites and I found that, let's say, one of them were blocked or two

of them were blocked, I might be alarmed because I would say that the odds that anybody's even looked at these sites would be very small. So probably they only looked at three of these sites and one of them is blocked, that is a high percentage.

Q Okay. And even if you factored that out, if you assume that they had looked at all 100 and categorized them in some way, would it be an indication of accuracy if you found in that set of 100 sites that only one percent of them were improperly blocked?

A All right. So let's say we have a filter and we—and it categorizes all of the sexually explicit sites correctly, and moreover it categorizes only one out of a hundred non-sexually explicit sites as sexually explicit, so that looks like a good figure.

But what you have to bear in mind whenever you're talking about a sample of this sort where one category is statistically far more predominant than another, is that the effects of that are multiplied by the size of the category.

That is to say, if there are one percent of the sites on the worldwide web that are sexually explicit sites and 99 percent are not sexually explicit, then categorizing one percent of those non-sexually explicit sites as sexually explicit actually brings your precision down to 50 percent.

Let me give a statistical—

Q I think the numbers are going to help.

A Okay. So let's say I have 10,000 sites, just a sample of web sites, 10,000 sites, all of which have been looked

at by filter, and let's say that it has—so in that 10,000 site sample I'm going to expect to find a hundred sexually explicit sites, that's to say one percent of the total, let's say it gets all of those rights, so it's got a hundred sites classified as sexually explicit and they're all properly classified as sexually explicit.

Now, let's say also that it misclassifies one percent of the sites that are not sexually explicit is sexually explicit. Well, that's 9,900 sites and if it misses one percent of those, it's going to 99 sites that it's misclassified as sexually explicit.

So the precision of this filter is going to be a hundred sites that it got right, plus 99 sites that it got wrong, or slightly better than 50 percent.

Q And what would tell you about the number—the percentage of errors on the control list if that were the facts?

A I'm not sure—

Q The percentage of accurately—

A Well, in that case, on the control list 50 percent—I mean the precision of—the actual precision of the control list even though is only misidentified one percent of thenon-sexually explicit sites given that disproportion the percentage of errors on the control list would be 50 percent.

Q Okay. Now, you've discussed at some length the number of flaws in the filtering technologies that you studied and I just want to ask in closing, is it your belief that these are only temporary problems that are going to go away with advances in technology?

A Well, certainly you can improve this technology.

JUDGE BECKER: Excuse me, but it would help if you would answer the question first, and then explain your answer rather —

THE WITNESS: Oh, I'm sorry.

JUDGE BECKER: —than go off on an explanation that doesn't tell us what the answer is.

THE WITNESS: No. No, I don't think these are simply temporary problems. You can improve the performance of these systems incrementally, but each new increment comes at a higher cost, and the reason for that is that in classification, as you try to make improvements you're dealing with harder and harder cases.

To take an example that I talked about yesterday, if you're looking at these dog pictures and you're trying to improve the performance, the better you get, the more you're having to deal with pictures of dogs that look like wolves or rule out pictures of wolves that look like dogs.

So it just gets harder and harder to make these improvements, and at a certain point you've reached the level where the technology—just given the limits of the technology just isn't capable of reproducing the kinds of subtle human judgments that are involved in this.

There are some tasks that people do that machines can do very well, because the tasks that people—the task could be reduced to a more or less mathematical for playing chess, for example.

It didn't take that long to build a machine that could beat a human at chess. It doesn't use the same—exactly the same strategies and processes, but it's something that could be reduced mathematically. If it's—a human capacity like—that involves subjective judgment as these do, then the technology just simply can't get there.

The other point to bear in mind that while small incremental improvements may be made in the performance of the filters, the number of the size of the control list is growing at an enormous rate.

So if you go from a 90 to 93 percent precision, that's good. But if in the course of that you've increased the size of the control list by ten times, then the amount of protected speech that's blocked by this has increased enormously in the process. I don't know if that—

Q In absolute terms?

A In absolute terms.

Q Okay. And just for the record, if you could just look at Exhibit 70—

MR. SMITH: Which I am not going to ask questions about, Your Honors, I just want him to identify it as an expert report.

BY MR. SMITH:

Q Is this the main text of your expert report that you submitted in this case?

JUDGE FULLAM: If you say so, we'll take your word.

THE WITNESS: Oh, 70 is the expert report? Yes.

JUDGE BECKER: Dr. Nunberg, how difficult would it be to design a filter that blocks only web sites that have been judicially determined to be obscene?

THE WITNESS: Well, if—that would be easy in the sense that if there are web sites that have been judicially determined, then that particular web site has been entered, the name of that web site is known, you could just say you can't have access to this site, that's easy provided that the web site maintains the same URL and the same address and so forth.

JUDGE FULLAM: And doesn't change the content?

THE WITNESS: And doesn't change the content.

JUDGE BARTLE: So all that someone would have to do would be to change it slightly, the it wouldn't be exactly what the Court had declared to be obscene?

THE WITNESS: Well, I'll leave that to you—

JUDGE BARTLE: I mean that's—

THE WITNESS: —Your Honors.

JUDGE BECKER: Just reviewing or recapitulating your testimony, what is the biggest problem, under-blocking or over-blocking?

THE WITNESS: I don't think that's a question you can answer in the abstract and I don't mean to be evasive, but I think it's a question of what your concern is. If your concern is getting maximum coverage and blocking anything that might conceivably be offensive,

then you're going to stress under-blocking as a crucial problem.

If your concern is of not having protected speech blocked, then clearly over-blocking is going to be a problem. My sense is though that the filtering companies, in their advertising, tend to stress recall rather than precision. That is to say you see the filtering companies frequently advertising we get—we block 90 percent of the sexually explicit speech or sexually explicit sites on the web or 95 percent of the adult sites.

The claims are always of that sort. There are claims about recall, and the assumption there must be—

JUDGE BARTLE: What is the technical meaning of recall?

THE WITNESS: I'm sorry. Recall is the under-blocking problem.

JUDGE BECKER: Under-blocking.

THE WITNESS: What they're saying is we're getting as many of the adult sites as we can. They rarely say or they never say, as far as I know, we don't block any protected speech.

JUDGE BECKER: What you're suggesting is that the results depend upon the philosophy, as it were, of the blocking companies insofar as they designed their system to achieve a certain goal?

THE WITNESS: Yes, yes. That among other things. It could—also depends on the inherent difficulty of the problem. I mean if there is a lot of stuff to categorize,

there are limited resources to categorize it with, and that's just going to let certain amounts of—

JUDGE BECKER: But if you're dealing with a reasonably, prudent, non-zealous blocking company, the best of all possible worlds, the best of all possible blocking company, your description of the intrinsic problems lead you to the conclusion that no matter what you do, there is always going to be under-blocking and over-blocking?

THE WITNESS: Right.

JUDGE BECKER: And which is the bigger of the two, problem of the two in terms of the built-in flaws in the system?

THE WITNESS: I don't think you can say.

JUDGE BECKER: You can't say that.

THE WITNESS: I mean I think it's very difficult to say. It's a question of how you measure it, what the consequences of it. When we build systems to do anything, we have to evaluate them relative to a particular intention or goal or purpose.

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[TESTIMONY OF J. NUNBERG]

[March 26, 2002]
[pp. 51-52]

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[CROSS-EXAMINATION]

BY MS. BHATTACHARYYA:

Q Dr. Nunberg, pornographic web sites are not that hard to find on the internet, are they?

A No.

JUDGE BARTLE: I'm sorry. I missed the question. What was—

BY MS. BHATTACHARYYA:

Q Pornographic web sites are not that hard to find on the internet, are they?

A No.

JUDGE FULLAM: How hard is that?

BY MS. BHATTACHARYYA:

Q In fact, you could find a large number of pornographic web sites fairly rapidly, couldn't you?

A Absolutely.

Q Based on what you know about the filtering companies, you assume, don't you, that the tools used by those companies do very well in finding large numbers of pornographic sites on the internet?

A Yes.

Q And in fact, if you were designing an automatic tool that was trying to extract from the web those sites that were likely to contain pornographic content, you would use all the techniques that are used by the filtering companies, wouldn't you?

A Yes.

Q And you would concede, wouldn't you, that the use of one of these filtering products is successful in restricting access to some large number of pornographic sites on the web?

A Yes.

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[TESTIMONY OF J. NUNBERG]

[March 26, 2002]

[p. 62]

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A The filtering companies rely as well, yes, that's right, the filtering companies rely as well on for example these web rings and directories and so on, but the web rings and directories proceed using the same techniques that the search engines do that is to say of following links and the limits that again are the limits that I was talking about yesterday.

Moreover, as I again mentioned in my expert report, there's extensive research on the mathematical properties of these link structures on the web which shows that they tend to converge rater then to diverge. That

is to say that doubling the number of index pages and links you follow doesn't doubt the number o sites you find but it perhaps increases it by 40 percent and doubling it again increases it by 25 percent that there's a kind of law on diminishing returns on this, and again this is documented in a very extensive literature in the mathematic of web—of the structure of the web.

So again, it wold be perhaps misleading to call it an assumption since it's based on this large literature on the search engines and the structure of the web.

Q But you haven't reviewed any literature of that scope and coverage relating to the manner in which the filtering companies find things on the web have you?

A I'm not sure if I understand the question, but probably the answers no.

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[TESTIMONY OF J. NUNBERG]

[March 26, 2002]

[p. 75]

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BY MS. BHATTACHARYYA:

Q You discussed in your direct testimony the concepts of precision and recall, correct?

A Yes.

Q And the concept of precision which you defined yesterday as the percentage of documents that returned that are correctly classified, did I get that right?

A Yes.

Q That concept relates to the notion of over-blocking, that's fair?

A Yes.

Q And the concept of recall you defined as the percentage of total documents in the category that are returned, is that right?

A Yes.

Q And that concept recall relates to the notion of under- blocking, is that right?

A Yes.

Q You didn't attempt to determine as you testified the precision rate of any filtering product did you?

A No.

TESTIMONY OF J. NUNBERG]

[March 26, 2002]

[pp. 79-80]

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BY MS. BHATTACHARYYA:

Q You didn't attempt to quantify as an absolute matter how much the filters may over-block did you?

A No.

Q And you didn't attempt to quantify as an absolute matter how much the filter might under-block did you?

A No, I didn't.

Q Dr. Nunberg, you're not qualified as an expert to judge how well a filter has to perform in order to be used in a library context, isn't that correct?

A Yes, that's correct.

Q You believe that the decision about how well filters need to perform in those contexts is a decision best left to the Courts, isn't that right?

A Yes, I do.

Q But you haven't provided this Court with data from which it can make a decision either relatively or absolutely about the weight—I'm sorry, I'll rephrase.

You haven't provided the Court with data with respect to the rates at which the filters either over-blocking or under-block, isn't that right?

A I haven't—to repeat what I said earlier, I haven't done any studies of precision or recall of these filters.

Q And you haven't provided the Court with any data with respect the absolute numbers of things that are either over-blocked or under-blocked, is that right?

A That's right.

(Pause in proceedings.)

Q I'm going to flip your chart again, can—

A Sure.

Q —I do that?

You testified on direct and you discuss in your report some 29 sites that you plan to demonstrate these five various flaws in the filtering products, is that right?

A Yes.

Q And in order to compile that list os 29 sites you used search engines to search on terms that you thought might give you less classified sites, is that right?

A That's how I found most but not all of the sites I used in this test.

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[TESTIMONY OF J. NUNBERG]

[March 26, 2002]
[p. 93]

MR. SMITH: I have no redirect, Your Honor, but I want to move into evidence exhibits relating to this witness. Exhibits 70 through 75, 77, 79, 80 and 84.

JUDGE BARTLE: Any objection?

MS. BHATTACHARYYA: No objection, Your Honors.

JUDGE BECKER: They're received.

(Plaintiffs' Exhibits 70 through 75, 77, 79, 80 and 84 are admitted in evidence.)

JUDGE FULLAM: I have one question.

THE WITNESS: Excuse me, Your Honor.

JUDGE FULLAM: Am I correct in my understanding it's your testimony there's no way that visual depictions as such can be blocked?

THE WITNESS: Well, that's—if you want to simply say, don't show any visual depictions, show no logos, show no pictures of any sort, that's a relatively easy thing to do, you just say, a text only. And there are libraries, I understand, who have just taken this expedient of saying no one can have access to any visual material whatsoever by the web, and that would, of course, conform with the—

JUDGE FULLAM: No pictures.

JUDGE BECKER: But the minute you try to identify or distinguish among photographs, that's when the trouble begins?

THE WITNESS: Yes. It just can't be done.

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[TESTIMONY OF E. ROOD]

[Mar. 26, 2002]
[pp. 142-151]

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[DIRECT EXAMINATION]

BY MR. HANSEN:

Q Ms. Rood, how old are you?

A I'm 16 years old.

Q And where are you living at the moment?

A I currently live in Great Barrington, Massachusetts. I attend Simons Rock College.

Q What is Simons Rock College?

A Simons Rock is a liberal arts college. It bills itself at the college for younger scholars. It's a small school, we have 390 students and we're the only school in the nation that's designed for students who leave high school early. I came to Simons Rock after my sophomore year of high school.

Q And when you complete the program at Simons Rock, what kind of degree will you receive?

A If I stay at Simons Rock for four years, I'll have a B.A. degree.

Q What's your hometown?

A I'm from Portland, Oregon.

Q And with whom do you live when you're home?

A I live with my mother and my sister.

Q What is your mother's occupation?

A My mother is a librarian.

Q Are you a plaintiff in this case?

A Yes, I am.

Q And did you become a plaintiff in this case, and are you testifying here today with your mother's permission?

A Yes, we talked about it a lot before I became involved. She's really supportive.

Q Have you ever used public libraries?

A Yes, I have.

Q Can you describe why you would use a public library?

A For the same reason anyone would use a public library, for information.

Q Have you—specifically what library do you use when you're home with your mom and your sister?

A I use mostly Multnomah County Public Libraries. There's a main branch downtown, that's the central library. And it's the largest and the most extensive, so I mostly use that one when I'm trying to do research. But there are also a couple of smaller branches closer to my house that I'll use upon occasion.

Q And do you still use the Multnomah Library when you're home on summers or holidays?

A Yeah, definitely.

Q Have you used the internet?

A Ever?

Q Yes, ever?

A Yes, I have.

Q Do you have internet access at school?

A I do.

Q Does the school utilize any blocking software on its internet access?

A No.

Q Do you have internet access at your mother's home?

A I do.

Q And is any blocking software utilized on that computer?

A No.

Q Have you used internet access at the Multnomah Public Library?

A I have.

Q And would you describe how that came about?

A Well, I use the internet when I'm at the public library if I am—if I need to do research of one kind or another. And so I would go on the internet to look things up.

Q Was there a time when you went to the Multnomah Public Library to do a specific topic of research on the internet?

A Yeah. Most of—let's see, about two years ago, I'd say the summer before my ninth grade year in high school I was—it was '99, so I was 13, almost 14, that summer I went to the public library more than usual, more than I had before or have since because I was questioning my sexual orientation and I was doing research online to try and find out information about

being gay and coming out, and it was, well, you could say it was a pretty sensitive topic and so I wanted to do it at the library rather than at home because I didn't want my family to know what I was doing.

Q Does the Multnomah County Public Library offer the option of blocking software for patrons?

A Yes, it does.

Q Did you utilize that option?

A No, most certainly not.

Q Why not?

A I had experience with blocking software before because my middle school did have blocking software installed on its computers in the library and the classrooms, and I knew that blocking software would probably inhibit my research at the library.

Q Can you give an example of that?

A Sure. One time when I was in eighth grade a friend of mine was trying to do a report on humpback whales and he was trying to access information on the internet and he was searching with the terms, humpback whales, and the filter wouldn't let him get anything with the words, hump, in it, and so he couldn't find very much information at all.

JUDGE FULLAM: Had to switch over to gray whales, I guess.

THE WITNESS: I guess so.

BY MR. HANSEN:

Q What kind of sites did you visit while you were doing research at the Multnomah Library about your sexual orientation?

A Mostly two different kinds of sites, I guess you can say. The one kind would be sort of very educational site, mostly made by grownups, such as like, you know, I think I might be gay, what do I do, and written by, like, guidance counsellors or people with authority, sort of basically educational informational resources for teenagers. And then also some of the sites I spent more time on were more personal web sites of individuals and telling their coming out stories and their personal experiences, and basically to counsel people in my same situation that I could read and become more familiar with and more comfortable with the idea of being gay.

Q Did you engage in any chat resources while you were using the library?

A Yeah. Yeah, I used a couple of sites like, planitout.com, I think, and gay.com, two of the major ones I used. They have chat rooms where you can talk to other people in real time on, you know, a variety of whatever you want to talk about. So I basically found people that I can talk to and explain my situation where I was in the closet, I wasn't out to anyone, I didn't really have anyone else I could talk to in real life, and it wasn't something that I was comfortable talking to anyone in my family about. And so I found people online that I could talk to and who could offer me advice and support.

Q Did you find this research helpful?

A Oh, incredibly helpful.

Q Could you explain why?

A That was a time in my life when I was really isolated and alone because I didn't really feel comfortable talking to anyone that I knew about this subject. It's a very sensitive topic, it was a big secret. And by being able to access information freely on the internet at the public library where no one knew who I was or what I was looking up. I was able to become so much more comfortable with myself and find out information that was really helpful to me in my basically personal growth as a human being.

Q If one of the sites you went to had been blocked by blocking software, would you have gone to a librarian to request that it be unblocked?

A Oh, definitely not.

Q Why not?

A It wasn't something I could share with someone. I couldn't go up to a grown-up, an adult working at the library and ask them to do that. You know, my mom is a librarian, she's in the library community in Portland, but if they saw my mom and say, hey, I saw Emma at the library looking up gay web sites, what does that mean? I mean it wasn't something that I could do.

Q Do you have any reason to believe that any of the kinds of sites you went to would have been blocked if you used blocking software?

A Yeah, probably.

Q And what makes you think that?

A Well, one time when I was at school, trying to use the internet at school that had the blocking software on it, I tried to look up—like I put lesbian teenager into a web site and I couldn't get any information. And then another time when I was at the public library, the Multnomah Library, I went to a computer that had already—when you try to use the internet at Multnomah, a screen pops up saying, would you like filtered or unfiltered, and usually I would choose unfiltered access. But at that particular instance I went to a computer that had already—somebody had already chosen and I tried to get some stuff on the search engine and things were coming up blocked and I realized they must have—I must have been using one that had been chosen to use filtered access, and so I just switched to a different computer because I couldn't access—I think I was trying to get to lesbian.org.

JUDGE FULLAM: Could I ask just for the record, how old are you?

THE WITNESS: I'm 16 and a half, I'll be 17 in September.

JUDGE FULLAM: I understood you to say 15, and I checked and elsewhere you're listed at 16. I wanted to make sure we were correct. Okay.

BY MR. HANSEN:

Q Are you generally familiar with the Children's Internet Protection Act?

A I'd say generally familiar, yeah.

Q What would be the effect on you if the Children's Internet Protection Act went into effect and the Multnomah County Library chose to use blocking software?

A I'd say it would pretty much have an entirely detrimental effect.

MS. BHATTACHARYYA: Objection, Your Honor. Speculative.

JUDGE BECKER: Overruled.

MR. HANSEN: You can answer it.

THE WITNESS: Okay. Basically I think it would be detrimental for one, because it would be pretty frustrating. I would be pretty frustrated that I couldn't have access to information that I needed and wanted. And because, you know, I'm sure I'm a minor, but I'm a freshman in college. I consider myself perfectly responsible enough to decide what information is valuable or what I need to see or don't need to see. And if by some chance I came across something that wasn't what I was looking for was objectionable, I could just close that window and go somewhere else. So I think it would just not be helpful in any way.

Q Do you think it would be detrimental to other teenagers who are questioning their sexuality?

A Yeah.

Q Why?

A I really think it would. One of the main problems that sexual minority, sexual minority as being gay, lesbian, bisexual, transgendered, questioning youth—

MS. BORNSTEIN: Objection.

JUDGE BECKER: Ms. Bornstein, I take it?

MS. BORNSTEIN: Yes. Object again for speculation. It's even more speculative.

JUDGE BECKER: Overruled.

THE WITNESS: Where was I? Oh, yes. One of the main problems for sexual minority is the sense of isolation that we feel because see how this is—it's really not socially acceptable to be gay in our society yet, and so it can be very hard to come out to people and find the support systems that we need to find friends and family who are accepting or basically anyone who is accepting.

So by being able to use the internet to find a community and resources and friendly people for youth who are in locations such as rural areas, or if they don't have the internet access at home, being able to use the library, the public library would be very helpful.

MR. HANSEN: Thank you, Ms. Rood. I have no more questions.

THE WITNESS: Thank you.

JUDGE BECKER: Cross-examine, Ms. Bornstein.

* * * * *

(17)

Supreme Court, U.S.
FILED
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No. 02-361

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

AMERICAN LIBRARY ASSOCIATION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOINT APPENDIX
(VOLUME 2)

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[TESTIMONY OF J. BERTMAN]

[Mar. 26, 2002]
[pp. 309-323]

* * * * *

[DIRECT EXAMINATION]

BY MR. BANKSTON:

Q Good afternoon, Dr. Bertman.

A Hi.

Q Could you briefly tell us about your educational background after high school?

A I have a B.A. from Vassar College and an M.D. from University of Massachusetts Medical School.

Q When did you graduate from medical school?

A 1993.

Q How are you currently employed?

A I'm a family practice physician in rural Rhode Island, I'm a clinical assistant professor of family medicine at Brown University, and I'm the president and medical director of afraidtoask.com.

JUDGE FULLAM: Could you be all these things a little closer to the microphone and a little louder, please?

THE WITNESS: I'm sorry, Your Honor.

JUDGE FULLAM: Thank you.

MR. BANKSTON: Do you need him to repeat the last answer?

JUDGE FULLAM: I'm afraid I did, yes.

THE WITNESS: I'm—

JUDGE FULLAM: I heard it, I said.

THE WITNESS: Oh, you heard it?

JUDGE FULLAM: Yes.

BY MR. BANKSTON:

Q Okay. And what is published on the afraidtoask.com web site?

A This is medical information, detailed information, and photographs on topics that many of us are uncomfortable discussing with parents, friends, even physicians.

Q And what motivated you to start such a site?

A A friend of mine, while I was in residency, asked if I could research what the normal male genitalia size is, and I looked into this and found that, in fact, there had been a number of clinical studies on this topic.

I realized this would be a good opportunity to spread a safe sex message and that really started the site.

Q Perhaps you could explain how the size of a man's genitalia is a health question or issue?

A Well, I think that many of us feel uncomfortable with our anatomy and physiology and want to know are

we normal, are these things on us, are these physiologic responses we have normal, and that's really the purpose of this.

Q Okay, afraidtoask.com, where is that based?

A Saunderstown, Rhode Island, out of my home.

Q And is there a staff for the web site?

A No, it's pretty much just me. A friend of mine, the same friend helps with PR and my sister does all the graphic design work.

JUDGE BECKER: You're a practicing physician?

THE WITNESS: Right.

JUDGE BECKER: A family practitioner?

THE WITNESS: Correct.

JUDGE BARTLE: You're affiliated with Brown University?

THE WITNESS: Right. I teach residents and medical students.

JUDGE BARTLE: Thank you.

THE WITNESS: They come to my office or I go to the residency at Brown.

BY MR. BANKSTON:

Q Is afraidtoask.com for profit?

A In theory. In practice, over the last six years, we've made a profit of $4,000.

Q Do you charge internet users to view the information on your site?

A People come to the site. They can have access to mostly the entire site for free. We do—we have added a fee-for-service where they can ask a specific question to a physician, usually myself.

Q But content posted to the site?

A Is all free.

Q Okay. Are there any other ways that you generate revenue?

A We receive some donations through the web site.

JUDGE FULLAM: Do you get any advertising out of there?

THE WITNESS: Right. Yes, sorry. That's the main revenue source. Recently we've started posting banner advertisements on our web pages. The more traffic we get, the more banners we show, and that's really the reason why over the last year we were able to turn a profit.

BY MR. BANKSTON:

Q Are you able to track the amount of traffic you have for that purpose?

A Yes.

Q And how is the traffic on your site?

A In February we had—

JUDGE BARTLE: Of this year?

THE WITNESS: Of this year, last month. We had 1.5 million pages looked at by 300,000 visitors.

BY MR. BANKSTON:

Q The traffic information that you have, are you able to see where users are linking from to get to your site?

A Yes. We're able to see what pages they've come from from other sites that are linking to us in general.

Q And do any of those users ever come from anonymizer sites as discussed earlier today?

A Yes, they do.

Q How would you characterize that, is that often or rarely?

A I would say regularly, significantly.

Q I'm sorry, afraidtoask.com is a plaintiff in this case, correct?

A Correct.

Q What is the target audience for your site, afraidtoask?

A Well, the site really anyone can look at it, and I think people of all ages do. Generally it's teens and young adults who are really coming to the site.

Q Do teenagers visit the site?

A They do regularly.

Q How do you know that?

A We have surveys on each of our guides where people can report their age and where they can give us recommendations about other guides or changes to our guides. So we have data from those surveys.

Q And that data is?

A That data shows that 25 percent of people are under 18, 25 percent are 18 to 24.

Q Okay. I would like to direct you to a document numbered as Exhibit 110 in the black binder in front of you.

MR. BANKSTON: Your Honors, for your convenience, we will be looking at Exhibits 110 through 114 in volume 1 of the Multnomah plaintiffs' exhibits. We will be looking at those sequentially.

BY MR. BANKSTON:

Q Can you identify what's on the item marked as Exhibit 110?

A Yes. This is a screen shot of the front page of our web site.

Q And could you describe what's on that page?

A This has most of our major topics, including sexually transmitted diseases, male and female genitalia, information on birth control, skin cancer, bowel movements, hair and hair loss, those sorts of things.

Q Moving on to what's marked as Exhibit 111, can you identify that?

A This is the front page of our bulletin board.

Q Can you please tell us what a bulletin board is?

A A bulletin board is a place where individuals can post questions and then other individuals can post responses.

Q And looking at 110 and 111, are those accurate representations for what a user would see if they were visiting your site?

A Yes.

Q Can you try and describe the typical discussion on your bulletin board?

A The discussions really vary widely. Some examples would be somebody posted a question that they had been raped on vacation and they weren't sure where to turn. Plenty of people ask, is my body, my anatomy normal, and questions about rashes. Really everything.

Q And do you respond to those queries or do other users respond to those?

A Generally other users respond. I do certainly respond to some. I'm constantly looking through the board, but this is a place where the community of people accessing afraidtoask really can interact with each other and get each other's views.

JUDGE FULLAM: Is there any way to check the reliability of the views expressed by these people?

THE WITNESS: No.

BY MR. BANKSTON:

Q When using the bulletin board, are users given the option of personally identifying themselves?

A They can. The vast majority do not.

Q Then how do they refer to themselves?

A They refer to themselves with user names or pseudonyms. It's very rare that I see an actual name. In some instances, I've even removed actual names.

My point in this is allowing people to really get across their views but not sort of post identifying information, although some decide to do that.

Q Why did you choose to put this feature on your web site?

A Well, this was—initially this was a commercial decision to try and bring users back to the web site and try and increase traffic. Over time, it really has become a major aspect of our site with—and I think serves a very important purpose.

JUDGE BARTLE: Are there any visual depictions on your web site or is it all just words and commentary?

THE WITNESS: No, there are very visual depictions.

MR. BANKSTON: We were just about to move to those exhibits.

JUDGE FULLAM: Unfortunately they're coming up.

BY MR. BANKSTON:

Q If you would please turn to Exhibit 112.

JUDGE BARTLE: You're ahead of it.

BY MR. BANKSTON:

Q Could you tell us what we're looking at?

A This is a page from the female genitalia guide that describes the vulva and the internal genitalia.

Q And what's on the page?

A A photograph—actually this is a cadaver photographer of a woman's vagina with a description of the anatomy.

Q Moving on to 113, could you please tell us what's pictured there?

A This is one of the pages from the male genitalia guide that shows a number of different erections as well as text about erections.

Q And finally 114, could you please tell us what is in that document?

A This is a page from another guide, our breast guide, that discusses how bra sizes are classically measured and shows photographs of various breasts of different sizes, shapes and colors.

Q And looking at those three exhibits, 112 through 114, are those accurate representations of what a user would see if they visited your site?

A Yes.

Q Okay. There are many on these pages that you've noted. Have you seen many photographs like that on other health sites?

A I really have not. The big web sites, like drkoop.com, webmd, really try and describe this information in text format and don't include the photographs.

Q Why do you—I'm sorry.

MS. BHATTACHARYYA: Your Honor, I'm going to object to this as lacking a foundation.

JUDGE FULLAM: Well, he certainly wouldn't say that if he hadn't looked at it.

JUDGE BARTLE: Have you seen them?

THE WITNESS: Absolutely.

MS. BHATTACHARYYA: But he hasn't testified as to how many he's looked at. He made a general—

JUDGE BARTLE: Well, he just mentioned several that he's —

JUDGE FULLAM: Okay. If that's an objection, it's overruled.

JUDGE BECKER: Go ahead.

BY MR. BANKSTON:

Q Without such pictures on other health sites, why have you chosen to publish them?

A I think really a picture is worth a thousand words, and I think to show pictures of breasts that are asymmetrical as we see in 114, or some with different degrees of nipple hair, things which I think many people are questioning about their own bodies, really gets across the information in much more detail than a description in text could.

Q Looking at Exhibits 113 and 114, you've used numerous photos. Why have you chosen to do that instead of using one or two?

A There really is a wide range of normal, and that's what we're trying to get across here, that erections come in all shapes and sizes and colors and so we tried to give an example of those.

Q Dr. Bertman, do you know what filtering or blocking software is?

A Yes.

Q Do you know if your site has ever been blocked by such software before?

A We have been blocked.

Q How do you know that?

A Mostly from personal experience. As I was doing this site and it was growing, I was proud of it and I wanted to show friends. And I tried on a number of friends' computers, showing them the software, and found that it had been blocked.

Net Nanny was one of them that I recall now as being one that blocked. When the case was initially

started a number of months ago, I went to see if we were blocked and at that time found as well that we were blocked. And finally, just last week, wondering if I had been unblocked because we were a plaintiff in this suite, I went to N2H2 as well as Cyber Patrol and found, in fact, the site was still blocked.

Q I'm sorry, blocked as what?

A When I—well, on N2H2 we were blocked as sex, nudity and medical. Those were the topics.

On Cyber Patrol, we were on their cyber not list, and I don't know exactly what—it didn't state what categories were there.

Now, I should just say, I put in the URL, including skin cancer, that was blocked as well. It's not just some pages.

JUDGE FULLAM: Did you ever make any attempt to have them unblock it?

THE WITNESS: Last week—there's an option there to send a URL so they can review it. I did that. I mean, there are so many of these companies to try and start mailing each of them and trying, hopefully that they'll unblock me.

JUDGE FULLAM: Until last week, you hadn't made any effort?

THE WITNESS: I can't tell you exactly when. I honestly have tried, I just don't exactly when.

BY MR. BANKSTON:

Q Have any blocking software companies ever notified you that you were being blocked?

A No.

Q Have any blocking software companies contacted you for any reason?

A No.

Q Do you expect that you will continue to be blocked by such software?

A I do. That's why I'm here.

Q Why do you believe that?

A I think by the nature of our site, these topics are sensitive and personal and show things that I think blocking software wants to block. That's my opinion.

Q Are you familiar with the Children's Internet Protect Act, the Act being challenged here today?

A Yes.

Q Have you read it?

A Yes.

Q How, if at all, will the Children's Internet Protection Act, if put into effect, affect the traffic on your site?

A I can't give you an actual number. I know that traffic will probably decrease as a result of being

blocked, and hence, revenue probably will decrease as well.

Q Are you familiar with the provision of the Children's Internet Protection Act that allows for the disabling of blocking software for bona fide research?

A Yes.

Q Or other lawful purposes?

A Hm-hmm.

Q And do those disabling provisions solve your problems with the Act?

A No, they don't.

Q And why is that?

A Well, I think that if a 14-year-old is concerned about whether a rash they have may be—

MS. BHATTACHARYYA: Objection, Your Honors, speculation.

JUDGE FULLAM: It is speculation that is almost self-evident I guess to what he's going to say. Go ahead.

MR. BANKSTON: May he continue?

JUDGE BECKER: I permit it, overruled.

THE WITNESS: If a 14-year-old is concerned about a rash being possibly herpes, I think it's unlikely they'll be comfortable approaching a librarian and asking them to unblock a site so they can look at pictures of herpes.

I also think that some librarians would be uncomfortable unblocking such a site as this, and—I mean, those are the main reasons.

BY MR. BANKSTON:

Q Has a court of law in any jurisdiction ever found any material on your site to be obscene, child pornography or harmful to minors material?

A Absolutely not.

MR. BANKSTON: I have no further questions at this time.

JUDGE BECKER: Cross-examine.

* * * * *

[TESTIMONY OF D. BIEK]

[Mar. 28, 2002]

[pp. 63-65]

* * * * *

Q The next Exhibit 22A is an example of a printout from the CD ROM that we've also provided to the Court.

Mr. Biek, is this the type of log that you looked at?

A It's the type of log I look at, but it's not the exact appearance of the log. As I see it, it's printed as two columns in a smaller type face arranged on a single sheet.

Q So it's the same information but a different format?

A That's correct.

Q Would you walk us through just the first entry on the first page and tell us what information you can glean from that entry?

A The first entry begins with the expression, "IC0222," which is a particular terminal at a particular branch library. We have the date, 2000/9/27. The next is the time of day that the internet session started in which this intercept occurred, in other words, the user signed on 39 minutes after 4:00.

The next timed expression four minutes after 5:00 p.m. is the time of day when this particular filter intercept was encountered. The next field if a time measure that we don't implement. There follows a list of probably 25 or so digits. This is information that is gleaned from the library card record that the user signed in from.

It's a non-identifying demographic information coded for gender, for year of birth for sensus tract of residents for a branch library where the library card was issued, all data that we've in the past to analyze the patterns of circulation of library materials.

The final four digits of this—

JUDGE BECKER: It doesn't tell you who the person was?

THE WITNESS: It does not identify the person. It does not include the library card number of the person.

JUDGE BARTLE: All visual depictions I take it?

THE WITNESS: These are all web sites that were flagged by the Cyber Patrol—

JUDGE BARTLE: Cyber Patrol so they cold include text.

THE WITNESS: That's correct.

The final four digits of this very long expression that you see, 1988 is the year of birth of the user in this case. There's a string of digits then that codes for I believe it's the expiration date of the users library card. We validate library cards once a year to make sure our information is current. Then comes the expression blocked. That indicates that this is a Cyber Patrol or that the intercept originated with the Cyber Patrol software.

The third line beginning http, is the web site address that the person attempted to reach. In this case it was a Yahoo search. Yahoo is a general purpose web directory and search engine. Included within the search terms or the entire URL here, the entire third line are the expression pinkpussy, those were the search terms that were used by the library user in this case.

Then comes the URL itself that was the result of that search. In other words the user would have typed in those search terms, gotten a list of results, clicked on a particular item on that list. That happened to be www.shavedpink.holowww.com. The forth and final line of the entry begins with the word from. What this is is what we call the referring URL. This is the URL that either the user entered directly or it chose the search that produced the connection to the flagged web

site, in this case it was a Yahoo search and it shows you the search terms that were used.

BY MR. ZICK:

Q So this was a 12 year old searching for the terms pinkpussy?

A That's correct.

* * * * *

[TESTIMONY OF D. BIEK]

[Mar. 28, 2002]
[pp. 134-135]

[CROSS- EXAMINATION]

* * * * *

THE WITNESS: That's correct.

JUDGE BECKER: —approach you?

THE WITNESS: That's correct, yes.

BY MR. HANSEN:

Q And the anonymas e-mail comes only after you've twice told me I don't have any expectation of privacy, right?

A The viewer has assented to two—those two screens and then it comes to this point.

Q Okay. Let's talk about an example where we do know context. I think you testified on direct that

Playboy (sic) Library does have a subscription does have a subscription to Playboy Magazine?

A We do.

Q And it appears of microfiche, correct?

A That's right.

Q And a ten year old can go and get the microfiche and load it on the machine and look at the Playboy Magazine?

A That's right.

Q And they can look at a picture of Miss September on the microfiche machine on the floor of the library with the screen sticking put so the passers by can see it, correct?

A We have a couple different styles of machines, but the one that you described does exist.

Q And Playboy.com is blocked by Cyber Patrol on the web, right?

A It is.

Q And so if a 45 year old female physician goes to your computers, and wants to see Miss September, she can't see it right?

A Not, on the internet station.

Q And if she sent you a request asking to you unblock Miss September you would say no, wouldn't you?

A I would.

MR. HANSEN: No more questions, Your Honors, thank you.

JUDGE FULLAM: Redirect?

JUDGE BECKER: Is there some particular reason why Miss September was chosen.

MR. HANSEN: Because it was the example we sued the other day.

* * * * *

[TESTIMONY OF J. SUDDUTH]

[Mar. 28, 2002]
[pp. 234-241]

* * * * *

Q Was there ever a time during this process we've discussed so far when any of the board members proposed removing the internet from the library?

A Yes. We discussed the various options and it—that option was definitely on the table in June of 2000 when we actually made—we actually made—proposed an addendum to the 1998 policy.

One of the options that we discussed very seriously was in the interim before we had this new internet use policy put in place, we actually considered discontinuing internet use service at the library.

Q When did the operations committee receive the log that said Exhibit 134?

A My recollection is we received the log in—it would have been in June 2000.

Q And you mentioned an addendum to your policy. Is that Exhibit 122?

A Yes.

Q And can you just highlight for us the differences between the June 22nd, 1998 policy and the addendum?

A Well, keep in mind, the addendum was generated right after we saw the severity of these logs that the staff had been collected.

We knew we needed to make some changes very quickly, hence what we did with the addendum was we put in time limits, two hour time limits per day. Essentially what happened with—with the computers at the main library as well as at all our branches, is we cut back, we reduced severely, I think it was in the neighborhood of 25 to 30 percent, the number of computers that had internet access.

We reconfigured them in such a way that they could be directly monitored by the reference desk at main, as well as the circulation desk at all the branches to give the librarian a visual contact with all the screens.

Q So you reduced the number of terminals with internet access?

A Yes.

Q What happened to the privacy screens and the recessed furniture?

A Also in the policy in number two, we actually removed those because it was clear from the documentation we were getting from the handwritten log from the staff that the problem wasn't going away even after we implemented the furniture and the privacy screens.

Q Now, did you have a code of conduct during this early 2000 range?

A We did.

Q Why wasn't that sufficient to deal with whatever problem the library might have been having?

A Well, the—my position and it was pretty clearly the board's position also at that particular time was—we wanted to take a position where—a proactive position because with the code of conduct, what was happening was in essence we were putting the staff in a position of almost literally policing an area, and a lot of issues that actually—by the time it got to a code of conduct violation, some of these situations had really gotten out of hand.

We simply felt like it wasn't fair—we had an obligation to our staff. It was a very, to put it mildly, a very unfriendly work environment for them and we felt like we had to make some changes, hence actually taking action so that this information didn't get into our library so it didn't turn into a code of conduct issue.

Q You mentioned the effect on the staff. What in particular was the effect on the staff of some of these incidents that are documented in the log?

A Well, first of all, we noticed a very high turnover rate among reference librarians that worked in that area, and it's also documented in our report, operations committee report that we had staff members who were being literally stalked by people who had been surfing inappropriate material in our internet area.

We had one staff member who was being e-mailed, being sent harassing e-mails by a similar patron, so it was clearly—it clearly had gone beyond the point of just viewing inappropriate material. It was actually the conduct.

Q When you say inappropriate, what do you mean by that?

A Pornographic, obscene material, clearly such.

Q Now, turning you back to the addendum to your policy, was that meant to be a long-term solution?

A No. In fact, when I mentioned one of our options was to actually—to actually discontinue internet service, that was going to be—whatever solution we came up with was going to be temporary until we could get a new internet use policy in place.

Q Tell me what happened next with respect to the internet use policy or internet access at the library?

A After we approved the addendum in June, then in the next month, in July of 2000, the operations committee met I think it was July 17th, I could be wrong, but it was in July 2000, the operations committee met just before we had our scheduled board of trustees meeting in July.

We on the operations committee formally adopted the report and the report of essentially abuses and the report essentially documented why we needed a new more comprehensive internet use policy.

The operations committee adopted that report and also adopted a new internet use policy and referred it to the board later in the day.

Q And Exhibit 121 would be the operations committee report, is that right?

A That's correct.

Q Did you participate in preparing any part of this report?

A I did, yes.

Q Could you describe the process by which the report came to be prepared?

A Essentially the process was, we took the log, the handwritten logs that the staff had made and we essentially incorporated those into this report and we tried to organize the report in such a way that it clearly documented each of our steps, you know, kind of along the way with—going from totally unfiltered internet access to really needing filters on our computers and we used those internet logs that the staff had compiled as evidence, if you will, and we actually categorized.

One of the members of the operations committee actually helped categorize these into different areas—

Q Take a look at—

A —almost like areas of severity.

Q All right. Take a look at page six of the report if you would and could you tell me if the incidents listed there are fair and accurate representation of what you'll find in the incident log that's Exhibit 134?

A Yes.

Q Can you tell me what your reaction was when you heard about these incidents?

A I was shocked.

Q Okay. Is there any particular incident or incidents that particularly shocked you?

A Yes, there were two in particular. One happens to be on page six, it's the second one down, the live video of people engaging in sex with animals, including "a girl dressed in leather with a strapped on plastic penis having sex with a dog," and "a man having sex with a chicken."

Q Were you aware at the time that those sorts of materials were available on the internet, Mr. Sudduth?

A I was not.

Q And would you take a look, please, at pages eight through 17. We'll start on page eight and going forward to 17, is that the categorization of the incidents you mentioned just briefly before?

A Yes.

Q And is there anything in particular in that set of incidents that drew your attention when you found out about it?

A Yeah. Well, obviously—well, I'll just tell you from my perspective, all of them are extremely graphic and extremely concerning.

One in particular hit me very hard. I have a child that's roughly the same age that referenced in this particular entry. At the bottom of page 12, the November 30th, 1999 entry and I'm not going to bore you by reading that to you, but essentially what happened was, we had an older gentleman—when I say older, he was 28 years old—he had been viewing pornographic information on one of our computers.

An eight year old boy walked by, he grabbed the eight year old boy by the arm and said, "Hey, buddy, take a look at this." And he pulled the boy over and held him by the arm in front of the screen and forced the little boy to look at the pornography. The little boy immediately turned his head away. Upon being reviewed by the staff, the adult male patron said, "Ten years now he'll be begging for it."

Q After the operations committee had received the logs and Exhibit 134 and received the operations committee report, what did the committee do next?

A I'm sorry, repeat your question?

Q What did the committee do next after the report was issued?

A Well, after the report was issued, the operations committee referred the report, you know, which referred the adoption of the report to the full board and the board of trustees adopted the operations committee report, as well as the new internet use policy.

Q Is Exhibit 119 in current internet use at the library?

A It is.

Q And does it provide for filtering of all patron access except for the one terminal you described?

A It does.

Q Are the staff terminals at your library filtered?

A No, they're not.

Q Does the policy prohibit a chat?

A No, it does not.

Q Did you vote in favor of Exhibit 119?

A I did.

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[TESTIMONY OF B. CRONIN]

[Mar. 29, 2002]
[pp. 89-97]

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Q Can the proliferation of the market for digital pornography pose a problem for librarians?

A I think there's an intersection of trends. One is the growth and the availability of digital pornography, and the other is the growth in the number of network computers in public libraries.

If you look at statistics from (indiscernible) National Commission and Libraries and Information Science, almost every public library in the United States is wired, some extensively, some minimally. So in theory depending upon whatever policies are in place and how they're enforced and so forth, but in theory an individual can go into almost any American library public library and access online web sites, which are displaying depending on how you wish to go about classifying it, soft middling hard and beyond hard pornography free.

This creates from what I've seen int he literature and from discussions with librarians problems in the work place for librarians and raises issues f public concern and indeed public safety.

Q Turning to the physical collections of public libraries in the United States, what is the OCLC database?

A It's a cooperative cataloging service established I don't remember exactly when, to summarize it makes available approximately 40 million catalog records. Covering not just, I have to add libraries in the United States, but world wide. This organization—

JUDGE BARTLE: What do you mean when you say it creates a concern for the public safety? Are you talking about physical safety of people?

THE WITNESS: I was referring to the fact that on occasion it has been documented that minors in public libraries connect with through chat rooms pedophile.

JUDGE BARTLE: I see.

THE WITNESS: On occasion those connection result in physical meetings which raises the specter of threat and physical harm.

I'm sorry, do you want me to revert to your last question?

BY MS. GACKI:

Q If you could.

JUDGE FULLAM: Are you telling us about OCLC?

THE WITNESS: I was telling you very briefly about OCLC. I think what is a jumbo catalog with 40 million records from 48,000 plus or minus libraries around the world, but many North American libraries.

Q Have you looked in the OCLC database to see how many libraries subscribe to Playboy?

A Yes, I asked one of my senior colleagues at the school to do that for me.

Q And what were the results of your search?

A The results are reported here, and I don't remember the precise number, but of the 40,000 or so libraries slightly more than 400 I believe are listed as having Playboy in their collections.

Q Did you also ask a colleague to look in the OCLC how many libraries subscribe to Hustler?

A Yes, I did.

Q And what were the results of that search?

A In that case I believe that the number was eight for the 40,000 libraries in question.

Q Do most American public libraries currently have pornography in their physical collections?

A No, American public libraries to be perfectly blunt and simple about all of this do not and never have collected pornography. Whether it be soft, whether it be hard or whether it be of any other kind, and nor historically have they ever done so.

JUDGE BARTLE: Of course that depends on one's definition of pornography, does it not?

THE WITNESS: It does, well, then I wold be happy to substitute another word sexually explicit materials for pornography.

BY MS. GACKI:

Q To what do you attribute the absence of pornography or graphic sexually explicit materials?

A Well, let me if I may, and it's not out of order preface my response by saying, I do not have any personal views on whether or not American libraries should or should not offer pornography.

I think there are perhaps three sets of factors that come into play. One, community standards, two, the legal framework. Certain materials are deemed to be obscene under the law. Child pornography is illegal, and thirdly the values both personal and professional of librarians.

So, it's community standards, professional librarians, and the legal and statute framework within which these institutions operate.

Q When libraries have collected pornography have they treated it differently from the rest of their collection?

A That is I think true in some cases at least. A concrete illustration might be the effective physical segregation of certain classes of material.

So, to put it very mundanely a pornographic magazine such as this might be available in the library and recorded in the catalog, but it may stored under a desk, it may be under lock and key. It may be on a top shelf, et cetera, et cetera.

So, there is a kind of apartheid on occasion I suspect in the way in which this category of material is and has been treated in America's public libraries.

Q If libraries had unlimited space and budget in their physical collections do you think that libraries would purchase and acquire all materials available?

A I can do no better than echo the comment of one of the previous witnesses who said, no. Librarians have never attempted to and even in a hypothetical world where they had infinite physical space and unlimited budgets I simply cannot imagine that as being a goal considered worthy.

The reason we have professional librarians in the public sphere is to build to develope, to create collections that have certain characteristics, and one of the characteristics is that the material is deemed to be very

often balanced in it's coverage, and deemed to be of requisite and appropriate quality.

Q And if—

A And if we didn't do this we would be having warehouses, and we wouldn't need librarians. The goal is not universal coverage, selectivity has always been of the essence in the practice of professional librarianship in this country.

Q Is the practice of selection consistent with the practice of filtering?

A Yes.

Q And why is that?

A Let's try and bring it to life a mundane example or two.

I want to buy a book of French provansal (ph) cookery for the library. I have two choices, it would be I look at my decisions is going to be based on for the sake of illustration, the level of the text, the accessibility of the text, the authority of the text, the engaging nature of the text, the reputableness of the publisher, reputableness of the author, the readability of the text, the quality of the illustrations, the quality of the pictures et cetera et cetera, and this is a fairly non-contentious I think choice, do you chose A over B, and I described that as utilitarian choice, functional choice.

Let's take a slightly different case, and I'm sort of making these up in real time. I want to add some material to the childrens collection. Book A and book B, maybe they're in different themes.

For the sake of argument, this book contains stereotypical imagery. For the sake of argument this book is also written in a way that suggests implicit or explicit racism, or it uses a language or it has a tenor that is redolent colonial or imperialism, colonialism or imperialism. All things being equal this book will not find a place in the shelf of the typical American library.

Librarians make judgments based upon such factors as stereotyping, whether they're gender roles, or ethnic characterizations.

Very simply political correctness will in some cases routinely inform book selection decisions in this country. Political correctness is an ideological not a utilitarian variable, and that's the kind of distinction.

We know from survey work over the years both fairly recent and more distant, that America's public librarians exercise choice and do not select materials which are deemed in many cases to be either by them personally or by the community to be contentious and that includes pornographic material.

American librarians have historically and currently still do exclude material on the basis of factors other than those that I wold label utilitarian or functional.

Q Is there any reason to treat the internet differently?

A It seems to me there is a glaring inconsistency if one does, and that is the single reason that I am sitting here today.

I think there is a fundamental structural inconsistency in the case being put forward by one of the

plaintiffs, the American Library Association and prevailing and historic practice in public libraries in this country, and I would add if I may that the views expressed by the American Library Association are certainly not the views of all and possibly in some cases not even the views of a majority of professional American public librarians.

[CROSS-EXAMINATION]

BY MR. SMITH:

Q Good morning, Dr. Cronin.

A Good morning.

Q I'm Paul Smith counsel for the AMerican Library Association.

A Nice to meet you.

Q How are you? I want to understand your views about ways in which filtering should be used in our libraries a little better.

You don't believe do you that filtering should be employeed to block access by adults to web sites that are A perfectly legal for them to view, do you?

A That is correct, I do not.

Q And you wouldn't therefore believe that a library should filter out material that is legal for them but harmful to minors from access by adults?

A No, they shoud restict the materials hamrful for minors but they should allwo material which is legal to adults.

Q Okay. And a web site which had material which is redlilent colonialism and imperialism you would say that that should be perfectly available to any one in the library, wouldn't you?

A That's not what I'm here to discuss, I'm here to discuss pornography.

Q Well, you mentioned an analogy between collections decisions, and gave an example of a book which would be excluded from the library because it was redolent of colonial ism or imperialism, and I want to understand the extent of the analogy—

A What I'm saying—

Q —so I need to know whether or not you agree that a web site with those same charectistics whould be avaliavble in the library?

A If it is legal and if it is consistant with community standards and it is consistant with the polic of the professional librarian, then I would defer to that locally made decision.

JUDGE BARTLE: Well, you wouldn'ty say that you could exclude Rudgerd Kiplin's writings he was he was certainly an imperialist.

THE WITNESS: For what my opinion is worth I most certainly would not because they have both historical and * * *

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[TESTIMONY OF D. DAVIS]

[Apr. 1, 2002]
[pp. 74-79]

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Q Dr. Davis, have you reviwed the CIPA legislation for this case?

A I have.

Q And do you have an opinion as to whether ot not libraries would use measures to restrick access to sexually explicit materials on the internet or acting consistantly with traditional mission and practices of public libraries?

A In my opinion it is consistant with the principles employes in public libraries.

Q Now, how familiar are you with the technology protection measures referred to in CIPA?

A I have mostly read about them.

Q And does that effect your ability to render an opinion on this topic?

A I think I understand the major arguments.

Q Can you begin by describing for the Court the various types of libraries, how they differ in terms of clientel and purpose?

A Well, there are essentiall four main types of libraries. The public library of course which deals with

the general population, the community. Academic libraries, academic and reaseach libraries have the clientel essentially related to a higher education and beyond. School libraries deal with the school population, and special libraries are kind of those that are uncategorized but deal with a more limited kind of clientel which is specialized, like industrial libraries, Governmental agencies, and alike.

Q What would you say is unique about the practice of public librarianship?

A The public library is not informed by the curriculum of a school by the categlog of a university, by the needs of a industrial or a commercial company in fact. It is designed to serve the needs of the community which is essentially providing the support.

Q And as a library historian in your opinion, what is the historic purpose of public libraries?

A Well, the purpose from the origins in the mid 19th Century have been to provide a framework of resources to enable the population to engage in self learning life long learning cultural enrichment, and leasure reading.

Q So, would you say that there's a recreational component too?

A I would think there is, yes.

Q Now, Exhibits 188B, I'm sorry, C, D, and E are mission statements for some of the libraries that testified. Multnomah County, Norfolk Public Library and Fort Vancouver Public Library, have you reviewed those mission statements?

A Yes, I have reviewed them.

Q And would you say that they conform to the historic purpose that you described?

A I think they describe them rather well actually. I'm looking at the Norfolk Public Library statement which is 188D, and it says better than I could the library provides equal opportunity access to information, high quality book and multimedia materials, programs exhibits and online resources to meet the needs of our diverse community for life long learning the cultural enrichment and intelectual stimulation.

Q Now, what would you say the primary function of professional librarians is?

A In my view over the history of the public library movement it has been to assemble the resources to meet the goals of the purpose of the library and that involves selection and acquisition of appropriate materials.

Q And what is a librarians role in collection development?

A Well, that's a primary one. It is usually delegated to the professional staff, and the director has authority from the board.

Q Do librarians make determinations about what is appropriate or inappropriate for inclusion in a library collection?

A They have to make those kinds of judgments all the time.

Q And do llibrarians have discuss to chose not to incllude materials for a collection?

A Well, the wouldn't look at it like that exactlty, but the materials which are not selected are in fact not in the library.

Q Even if for instance it's a book on light adult humor, is it possible that they would chose not to select that?

A It's possible. It may not be within the—it may not be a high priority based on the need that that staff understands in the community?

Q Now, how autonomus are librarians in making these selection decisions?

A They have a fair amount of autonomy. They make these decisions however, not on the personal whim and their own personal collecting habbits.

Q Now, what was the purpose—what is the purpose of library collection development policies?

A Well, they would—the policies are designed to enable them to make consistant decisions about materials. These are policies that are frequently and best drawn up in conjunction with representatives from the community.

Sometimes public hearings, discussions, input from the public and when these policies are then codified the priorities of the community these are written up and the board will likely approve this, and that becomes the policy.

This ought to be reviewed regularly as communities change in their interest and focus and so forth like that, but once it is done it means that the professional stafff have some basis on which to make their day in and day out kinds of decisions.

Q Okay. So what kinds of materials are generally included in public library collections?

A Well, they will run the gamet of the subject matters enumerated in the Doowey (ph) Decimal System for example from religion and philosophy and physchology to science of the arts, history, biography and also finction of various kinds.

Q Do public libraries—

A Children—

Q —excuse me.

A —and also by format and age groups like for childrens books.

Q Do public libraries collect sex related materials?

A They will have those which are appropriate to their collecting policies.

Q Can you give me some examples of sorts of materials that might be found in a public library that are sex related?

A The Joy of Sex perhaps which we're all familiar with would be an appropriate title. Other materials which have become classics in their field. They will have some, yes.

Q Would public libraries typically collect graophic sexual materials that are judged to lack educational or medical value?

A I know of none that do.

Q If a library had all the space and money that it needed that it could popssibly use, would a public library select everything for inclusion in it's collection?

A I think not. One of the roles of a community based public library is to find those materials which would be of most direct benefit to the diverse members of the community, and the whole intent is to have a well selected collection, not everything on every topic.

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[TESTIMONY OF D. DAVIS]

[Apr. 1, 2002]
[pp. 83-89]

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Q Do libraries generally exclude illegal materials from their print collections?

A I think they do, yes.

Q And as you said, local determinations are considered in what is included in a collection as long as it's not illegal, is that correct?

A The legal issue is simply the minimal standard of what will not be found. Local options will, in as broadly a manner as possible. They have the opportunity that

the responsibility to tailor the collection to meet the needs of the community.

Q Let's turn now to selection criteria. What selective criteria are considered by librarians when deciding which work should be selected?

A Which books should be—

Q I'm sorry, what sorts of collection criteria?

A Selection—well, they would look at such things as the content of the material, which would involve the accuracy or the currency, the niche this particular title holds in relation to what else is in the collection.

They would also look at the authority of the author, if it's a non-fiction title, the publisher. They would look at the characteristics of the presentation, is it appropriate, is it useful, are there better things that we should order rather than that, and also actually the physical standards of the book.

Q Do librarians use resources such as selection aids in making these decisions?

A They must use these all the time.

Q And what sorts of selection aids do they use?

A The profession has recognized this from almost the beginning, and has produced a series of review journals, bibliographies of various kinds, some of them general, some of them by type of library, some of them for type of user.

Q What are some examples of such—

A Well, one of the best known examples of this and most widely used is the highly acclaimed American Library Associations reviewing medium Book List, which was begun, I think, in 1905. I mean it's nearly 100 years old.

JUDGE BECKER: What were the first words of that, they analyzed what medium?

THE WITNESS: A well-respected.

JUDGE BECKER: Yes, but what's the title, what's it called?

THE WITNESS: Book List.

JUDGE BECKER: Okay. There were a couple of words in front of Book List.

THE WITNESS: Venerable or highly respected or—

MS. BORNSTEIN: He said that it was published by the American Library Association.

JUDGE BECKER: Okay. The venerable, okay, ALA's booklet. All right.

THE WITNESS: Right. And this is used widely by selectors in the public library, school libraries, some, and I've even known a few academic librarians to use it.

BY MS. BORNSTEIN:

Q Why do librarians use these selection aids?

A No one librarian could know it all, and no matter what their field of expertise, their training, their

education they are dependent on the professional evaluations of their—of colleagues.

Q And why is that important?

A Well, it helps guarantee something of the quality of the selections. There are many public libraries that, in fact, require or find highly desireable that a book which is selected be, in fact, listed in Book List or in Library Journal or a number of the other kinds of media which are used for this purpose.

Q Now, let's just focus on the specific aspect of training library students and educating library students.

Can you describe for the Court the sorts of courses and educations that an MLS student would study if they were choosing to go into public librarianship?

A All right. Most of the professional schools today train much more broadly than those going into libraries per se. But those going into libraries—well, let me back up just a moment, if I may.

Most schools will have required courses which every graduate is supposed to have, introductory courses, prerequisites and things like that.

Beyond that, people tending on a career in libraries, into public libraries, would take courses in reference and bibliography and materials. They would also take likely a collection development course, while not an official requirement, a very high percent would take that course.

They would take courses in the nature or the role of a public library, a kind of an administration course that would help them go through that, and they might well take a course on modern society and looking at the diversity issues and census building and all those kinds of things.

Q Okay.

A So a mixture of required courses and electives.

Q Great. Now, let's talk about the different formats of library materials. When libraries carry an item, let's say in book format, do they necessarily carry that same item in other formats, a video or CD ROM or however else it may?

A Not necessarily. Some will do that and others will not.

Q And when those other media such as videos or DVDs were first included in library collections, how did libraries apply collection determinations for those items?

A Well, that's an interesting question because, especially in the 20th Century when you begin to have sound recordings, motion pictures, and other kinds of media coming along, librarians always had to find a way or to think of how their principles of selection would apply with respect to a new medium.

And after a period of discussion and so forth, they usually have come up with these. Most of the selection policies I've seen in the material you've supplied have, in fact, lists of the criteria which generally parallel the

kinds of principles used for the selection of other print materials.

Q Now, do you think it's appropriate to plug the internet in in the library, turn it on and walk away?

A I think that's not—no.

Q What is your view about how the internet should be handled in the library as a new medium?

A Well, I think it should be—it's a phenomenal resource and it needs to be evaluated, used to enhance the principles and the mission of the public library as has been stated.

Q We spoke a few moments ago—

JUDGE BECKER: The need to be tamed, is that a good expression?

THE WITNESS: Well, if you're following the model which our profession has used, it will need to be evaluated and organized, if at all possible. Very difficult, but—

BY MS. BORNSTEIN:

Q Is there some—what do you think are some reasonable ways to try and evaluate that? Are filters a reasonable way to do that?

A I'm sorry?

Q Are filters a reasonable way to try and organize?

A Well, it is one way and it's a way that—that is—it bears some resemblances to the kind of standards which are employed in other media.

Q Now we spoke a little while ago about resource constraints—excuse me.

JUDGE BARTLE: Well, are there any differences?

THE WITNESS: Yes, there are.

JUDGE BARTLE: What are they?

THE WITNESS: And that raises a problem. That's an issue.

JUDGE BARTLE: What are the differences?

THE WITNESS: Well, the—

JUDGE BARTLE: That raise the problem?

THE WITNESS: Well, when one subscribes to the internet, it's like breaching a dam in a large reservoir and the materials just come.

To use another analogy, it is not regulated, it is not pre-evaluated. And so whereas in a conventional library situation, these titles, these kinds of information would be identified in advance. And they would be selected.

With the internet, because you cannot do that, you have to do it after the fact and approach it from the back end, as it were. And that means looking at your policy, your users, your community, your taxpayers and saying, all right, what is consistent with our policy.

And you would attempt to apply reasonable filters on those materials.

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[TESTIMONY OF D. DAVIS]

[Apr. 1, 2002]
[pp. 93-108]

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JUDGE BECKER: What you did say before is that when libraries purchase print materials, they use guides. Do they subcontract it out or do they—do they ever—

THE WITNESS: Well, how it works is that a vendor will provide materials based on that selection policy. For example, we want all of New York Times' best sellers for this year, or other materials are very low in our collecting profile. And these materials will then arrive at a library and if a library needs to return more than five percent or so of those materials, the vendor will say, well, you haven't drawn your collection development policy well enough, your profile which is based on that policy.

So with a vendor, they do the best they can to meet your needs, and then you look at the materials and you say, yes, they're right on this one, they're wrong on that one.

JUDGE FULLAM: Well, which comes first, the proposal from the vendor that the library purchase these particular books, or a request from the library to the vendor, we want to purchase these particular books?

THE WITNESS: Well, they have often delegated this to the vendor once the collection development policy is designed. And the vendors, however, do have librarians who work in their offices as they look at these profiles.

JUDGE FULLAM: Do book salesmen go around from library to library peddling their wares?

THE WITNESS: Oh, there is some hustling among these vendors, yes, sir.

JUDGE FULLAM: I thought so.

BY MS. BORNSTEIN:

Q In your report, you make an analogy to these approval plans in the online context. Can you sort of explain that to the Court?

A Well, it's almost a reversed mirror image of the situation. With an approval plan, you would return those materials which did not meet your collection development needs, and you would retain those which do.

I guess the nearest analogy with the internet would be that you look at the variety of materials that are there by various categories, and—which have already arrived in your library, and you would say, these do not meet them and I will employ a filter to prevent them in this particular library.

Q Now, if a patron has a specialized need for information that's not available in a public library, what does a librarian do to help that patron?

A The person—the professional librarian will attempt to ascertain the real need of the patron. This is often viewed kind of like a reference interview where you find out exactly what is needed, which will help the user.

And then you'll attempt to find it, either in other libraries in your system or you would go through an Interlibrary Loan procedure, or you might refer a patron to a government agency or a commercial book store or whatever.

Q Now how frequently is Interlibrary Loan used?

A Well, my understanding that outside of the systems of public libraries and sometimes multi-type libraries, that it is relatively low, less than one percent of the circulation.

I've seen figures of .25 percent, but I would say somewhere under one percent.

Q Okay. Now, we spoke briefly about the resource constraints in the print collection. Are there similar resource constraints that affect internet access in public libraries?

A The constraints there would, I guess, involve the length of time one can stay on a terminal, the need to sign up for a spot on this. It would very much like the kind of requirements sometimes used for using microfilm machines or a record of the players, video machines.

The kind of materials I've—policies I've seen also cautions about what kinds of materials ought not to be viewed.

Q Now, have you reviewed the internet use policies for the libraries in defendants' Exhibit 141 to 178?

(Pause in proceedings.)

A What numbers were those again?

A 141 to 178.

MS. BORNSTEIN: Your Honors, defendants' Exhibits 141 to 164 are internet use policies for libraries that currently use filtering software. And the Exhibits 165 to 178 are internet use policies for libraries that have certified compliance with CIPA in funding year four.

(Pause in proceedings.)

JUDGE FULLAM: What's the question?

BY MS. BORNSTEIN:

Q Have you reviewed those prior to today?

A I have looked them over.

Q And what is your view as to whether the standards established in those policies are consistent with traditional principles of librarianship?

A They seem to me to be generally in line with those kinds of principles and standards.

JUDGE BECKER: These are from—appear to be from all over the country?

MS. BORNSTEIN: Yes.

THE WITNESS: Right.

MS. BORNSTEIN: A variety of library systems.

BY MS. BORNSTEIN:

Q Does using a filter to exclude sexually explicit material constitute censorship in your view?

A Not in my view.

Q Now, you're aware that some filters may block things that they are not configured to block, is that correct?

A Yes. That is the case.

Q And does that concern you?

A A little bit, but not as much as the—as the benefits and economies of protective filtering devices.

Q Now, on page 11 in paragraph 42 of your report, which is Exhibit 186, you say that for libraries to abandon this function, meaning the function of selection and deselection—

JUDGE BARTLE: What page are you on again?

MS. BORNSTEIN: I'm sorry. Page 11, paragraph 42, in Exhibit 186.

JUDGE BARTLE: Thank you.

BY MS. BORNSTEIN:

Q "For libraries to abandon this function, the function of selection and deselection, in relation to the worldwide web, that they have historically carried out

as a public trust with conventional media, is tantamount to abandoning the core of the professional vocation."

Can you explain to the Court what you meant by that?

JUDGE BECKER: What page is that again?

JUDGE BARTLE: Eleven.

MS. BORNSTEIN: Page 11, paragraph 42.

JUDGE BECKER: All right.

THE WITNESS: Well, this statement reflects my opinion that the expertise, the professional expertise which prepared librarians bring to a public library is largely that of selecting materials which will be most useful, most appropriate for the communities which have hired them.

JUDGE BECKER: Well, Dr. Davis, you say here that for librarians to abandon the function of deselection is tantamount to abandoning the core of a professional vocation with other professionals or for its clients unregulated internet for information.

But when I asked you before as to whether the professional library could, in effect, be a surrogate for a technology protection device, you said that it was humanly impossible for them to do it.

So if that's the case, how can you fairly say that there's an inconsistency with the purpose of the public library for librarians to abandon what I'll call now the—and what you referred to—as the deselection

function if it is physically impossible for them to do it in the internet context?

THE WITNESS: I think the phrase that I used was selection and deselection, and with respect to my previous comment, it was in the context that with the internet it would be very difficult, extremely time consuming for a library staff member to look at every single web site and—

JUDGE BECKER: Isn't that what we're talking about here is the internet? I mean, I assume that is what paragraph 42 refers to?

THE WITNESS: I guess my point was, Your Honor, that because librarians cannot do it on that micro-basis, they ought not to abandon it all together.

JUDGE BARTLE: I guess what you're saying is that the librarians are delegating it to these internet companies.

In other words, they're delegating that function, they're acting as the agents of the librarians?

THE WITNESS: It's a technological solution to a unique technological medium.

JUDGE BECKER: Well, it could be that Judge Bartle and I have, by posing these questions to you, interrupted your train of thought. Why don't you tell us, in response to Ms. Bornstein's question, what you mean by paragraph 42?

Or does it speak for itself?

THE WITNESS: What I mean is, this is a very difficult area —

JUDGE BARTLE: We would agree with you on that.

THE WITNESS: —and librarians, professional librarians who come from a long tradition of establishing collections which are to be trusted and used for the community's good, because it is difficult if not impossible to site-by-site select and reject, they ought not to abandon their principle of maintaining the quality resources.

And in order to do that with the internet, one can't just throw up one's hands and say I can't do it, but it needs—one of the ways of doing that at the present time is through the development and refinement of filtering devices.

JUDGE BARTLE: You've talked a lot about the—there's a selection policy, even if the library had unlimited room they would be somewhat selective. But aren't you also saying that in their selectivity, they can't be selective in excluding one political viewpoint as opposed to another?

THE WITNESS: Absolutely.

JUDGE BARTLE: There's some refinement, there isn't absolute selectivity. And there's got to be limitations on that, I would think.

THE WITNESS: Exactly. And I think all the policies that I have read anywhere would endorse the policies put forth by the ALA's bill of rights which has some clause in there, I can't cite it exactly, that materials are

not excluded for political reasons, racial reasons, gender, and a whole lot of things.

MS. BORNSTEIN: Your Honors, at this point, I would like to move into evidence defendants' Exhibits 141 to 178, the internet use policies, defendants' Exhibits 186, 187, 188, 188A and 188C, D, and E which are—

JUDGE BECKER: Any objection, Ms. Beeson?

MS. BEESON: Yes, Your Honor. As to just the 141 through 178, those are filtering policies for libraries who are not involved in the case. They're hearsay. The policies are hearsay, and so we do object to those.

JUDGE BECKER: Come on. Aren't they admissible under Federal Rule of Evidence 8038(c) or—

JUDGE FULLAM: Everything in these books is hearsay, practically.

JUDGE BECKER: 8038—under 8038, I mean they are declarations of public policy. Overruled.

Anything else?

MS. BORNSTEIN: Thank you.

(Defendants' Exhibits 141 through 178, 186, 187, 188, 188A, 188C, 188D, and 188E are received in evidence.)

JUDGE BECKER: You may cross-examine, Ms. Beeson.

CROSS-EXAMINATION

BY MS. BEESON:

Q Good morning, Dr. Davis.

A Good morning.

Q You agree, don't you, Dr. Davis, that intellectual freedom is a basic building block in the way Americans view the world of libraries?

A It's a foundation.

Q And although you believe that the primary purpose of libraries is educational, you define education as "The whole corpus of human experience that has contributed to who we are as a people in a species," right?

A I have said that.

Q And you believe that there would be relatively little that would not have some value to education, is that right?

A Yes.

Q In fact, you think that libraries could responsibly collect even extremist materials because there might be an educational value in such materials, isn't that right?

A Libraries some place, I doubt if a public library will do that. I think the context there is any library, and its research libraries.

Q And you believe that libraries should not prevent adults from accessing even pornography in public libraries as long as it is not illegal, isn't that right?

A I think illegal is the minimal ground for that.

Q Okay. And in fact, you think that the library has a professional duty to provide access to materials that are not illegal; isn't that right?

A That's true.

Q And you would depend on the Courts to decide what is legal and what isn't ultimately, right?

JUDGE FULLAM: Or the legislature.

THE WITNESS: On the legality issues, yes, of course.

BY MS. BORNSTEIN:

Q And you would agree that it's the librarian's job to assist patrons in finding material even if that material is not within the public library's own physical collection, isn't that right?

A They would make an effort to do this.

Q And they do that through Interlibrary Loan and referring patrons to other libraries, et cetera, as you mentioned before?

A Yes.

Q You say that—

JUDGE BECKER: You said they would do that. The question was do they, within the field of Library Science, is that generally considered to be an obligation of a librarian to seek an Interlibrary Loan?

THE WITNESS: Insofar as they're able, I think professional librarians want to help patrons receive materials for legitimate—

JUDGE FULLAM: And they feel an obligation so to do, right?

THE WITNESS: Yes.

JUDGE FULLAM: Thank you.

BY MS. BEESON:

Q You say that blocking programs could be used as selection aids much like those traditionally used by librarians, right?

A I say they bear some similarities.

Q Okay. But when a library makes a selection decision, it is not sending a message to patrons that the materials within the print collection should be used to the exclusion of other materials, isn't that right?

A Would you repeat that question?

Q Sure. When the library makes a selection decision regarding its print collection, it is not sending a message to its patrons that the materials within the print collection should be used to the exclusion of other materials, is it?

JUDGE BECKER: I don't understand what that means.

THE WITNESS: Only insofar as it's not—it's what they have at that particular library.

BY MS. BEESON:

Q And when a library returns materials to a vendor in this third-party, the use of a third-party vendor, does that decision prevent a patron from seeking that same material through other means?

A No.

Q Okay. And you do not believe, do you, that librarians should provide access only to internet sites that they have reviewed and preselected beforehand, do you?

A No.

Q Okay. And the need to protect children should not affect the selection of materials available in the library to adults, should it?

A Not necessarily. If it's—if, as the policy is drawn up, it's possible that some of those items may also be in the adult policy as well. I mean, our library does not collect explicitly sexual images which have no textual value either for adults.

Q Hm-hmm. But generally speaking, you don't think that the need to protect should influence the selection of materials for adults?

A I think not.

Q Okay. And you believe that librarians are supposed to be intellectual provocateurs, don't you?

A I do.

Q And if 1,000 residents of a community signed a petition to have a book removed from their library, you do not believe that would be sufficient for a library to remove the book, do you?

A Not sufficient reason.

Q In fact, you train your library students to resist any pressures by their communities to make selection decisions based on the controversial or offensive nature of the material, don't you?

A Yes.

Q And you believe that libraries should not install filters on terminals for use by adults unless the materials blocked are illegal, isn't that right?

A I think that's the primary foundational goal, yes.

Q And you believe that there are some detrimental effects to filters, isn't that right?

A Some.

Q Librarians are not trained to inquire generally into the intent of a patron for a particular request for materials, is that right?

A Yes and no. In the reference interview, it's always helpful if a professional librarian can ascertain the purpose for which an item will be used because that will

help him or her find the material which will be most appropriate.

That's not always possible to find that out. Sometimes patrons don't know. And they would be reluctant to tell you, but if you can find that out, it's viewed as a not unprofessional act.

JUDGE BARTLE: So if somebody asked for a book on sexually transmitted diseases, the librarian should ask why do you want to know about that subject?

THE WITNESS: You would ask perhaps, is this for a school report, is it for personal knowledge, is it—

JUDGE BARTLE: You would, that's appropriate?

THE WITNESS: If you're—in a given instance, if they don't tell you, do you want an encyclopedia article or would you like a book. If it will help you get to what you—what the patron wants and the patron will let you know that, it will help you. But you—

JUDGE FULLAM: If it turns out that your interview reveals that the patron really does want a particular book, do you say, but you're only reading it for your own amusement and that's not a good enough purpose, therefore I'm not going to get it.

THE WITNESS: I don't think the librarian would say that, no.

JUDGE FULLAM: Okay.

BY MS. BEESON:

Q Okay. And librarians are not trying to interview patrons for the purpose of denying the patron access to certain material, are they?

A That's not something they—it may happen, but that's not what they're aiming at, no.

MS. BEESON: That's all I have, Your Honor.

JUDGE BECKER: Any redirect?

MS. BORNSTEIN: No redirect, Your Honor.

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[TESTIMONY OF B. EDELMAN]

[Apr. 2, 2002]
[pp. 17-71]

* * * * *

A I did not seek to analyze the percentage of over-blocking, instead I sought to document numerous specific instances of over-blocking without rendering any particular opinion as to the percentage of over-blocking.

Q When did you conduct the tests?

A My testing began in June of the year 2000 and I completed it in my supplemental report just last month.

Q What specific programs did you analyze?

A I obtained and analyzed the most recent versions available at the time of my testing of Cyber Patrol, N2H2, Smart Filter, and Web Sense.

Q Did you use trial versions of those programs?

A I did not. I used the full commercial versions of the programs purchased for me provided to me by counsel for the plaintiffs.

Q How did you install the programs?

A I installed each of the programs on a separate windows 2000 installation, on a separate windows 2000 server.

Q And could you please now refer to Plaintiff's Exhibit 121, page four of that exhibit? First of all, tell us what that exhibit is?

A This exhibit is my expert report.

Q Does page four list the categories in which you enabled the programs to block?

A It does.

Q And can you just briefly summarize those for the products?

A Sure, for Cyber Patrol I configured the product to block content characterized by that program as adult sexually explicit. For N2H2 I configured the programs to block adults only nudity, pornography and sex, with acceptance engaged as indicated on page four. For Smart Filter, sex, nudity, mature and extreme, for Web Sense adult content nudity and sex. Those were the

only categories that I engaged for blocking for those four programs.

Q And how else did you configured the programs if at all?

A By enlarge I left the programs in their default configurations.

Q Now, you said that your purpose was to document specific instances of over-blocking, what do you mean by over-blocking?

A By over-blocking, I mean to describe the phenomenon, whereby internet blocking programs prevent access to web sites that are not consistent with the category definitions as written by the respective blocking programs for the categories for which blocking has been requested.

Q And how did you go about documenting specific instances of over-blocking by the programs?

A In order to document specific instances of over-blocking I first needed to establish a universe, a list of potential web pages that might be over-blocked and I did that by going to the internet directory service Yahoo!.

Q How does Yahoo! categorize sites?

A Yahoo! categorizes web sites into a hiarchial system devised by it's editorial staff.

For example, Yahoo! might place the web site for the U.S. Federal Court in Government, United States Government Courts, Federal Courts, and then you

would see a link to United States Federal Courts. It classifies some portion of the internet in this hiarchial system.

Q And how did you use Yahoo! to compile your data base of sites to be tested?

A I wrote a program that viewed ever category page within the Yahoo! directory, of which there are as I recall some tens of thousands, and retrieved each web site listed in each of those category pages.

In that way I was able to obtain a full listing of all of the web pages classified by the Yahoo! directory.

Q Why did you use Yahoo!?

A Yahoo! is a well known and generally well respected internet directory. Many internet users go there in order to find content on the web.

It was helpful to me in that it provided a reasonably large list of specific web pages that might be subject to over-blocking.

Q Did you also test additional web pages, other than the ones you obtained from the Yahoo! directory?

A I did.

Q And what were those?

A I'm aware that no single internet search engine manages to classify all web pages on the internet. The internet is just too big and that's too hard a job. For that reason I thought it was important to add some additional pages not classified by Yahoo!.

I used a feature in another search engine Goggle called what's related.

Q And what is the what's related feature do?

A The what's related feature when given a URL to particular web page returns a list of another set of web pages that are according to Goggle in some way similar and so in that way by feeding it a list of some hundreds or thousands or URLs from Yahoo! I would be able to obtain some thousands or perhaps, tens of thousands of additional URLs again to be tested for possible over-blocking.

Q Other than the Goggle and the Yahoo! sites did you test any additional sites?

A I did test the sites of the plaintiffs, in this case.

Q You mean the plaintiffs' who are web sites?

A Those plaintiffs'—

JUDGE BECKER: The main plaintiffs here.

THE WITNESS: —that have web site. That's right.

BY MS. BEESON:

Q How—do you know approximately the size of the list of web pages that you tested?

A In total I tested approximately 500,000 distinct web pages.

Q And once you had compiled this data base of site how did you test them?

A I wrote a program that over the course of some weeks or perhaps even months attempted to access each of these web pages through internet access restricted by each of the four blocking programs configured as previously discussed.

The program kept track of which pages it was able to access and which it was denied access to as a result of the configuration of the blocking programs.

JUDGE BECKER: You had to be present at your computer at all times while this was going on?

THE WITNESS: I certainly did not. I was asleep—

JUDGE BECKER: You did not.

THE WITNESS: —for the vast majority of the time I suppose. Instead the program did the work and maintained log files that told me the results of the work.

JUDGE BECKER: I see, so you got print outs?

THE WITNESS: I never actually printed them, but the equivalent of print outs.

JUDGE BECKER: So you showed them on the screen?

THE WITNESS: That's right.

JUDGE BECKER: I see, so they made log files and you looked at them on the screen?

THE WITNESS: That's correct.

JUDGE FULLAM: But we can't cross-examine your computer program, can they?

THE WITNESS: You can cross-examine me, and if I did the procedure properly the results of the procedure are ultimately in appendices to my expert report.

JUDGE BECKER: How many hours did the computer—this was more than one computer I take it?

THE WITNESS: There were several separate computers doing this report.

JUDGE BECKER: How many hours did the computers have to work even if Edelman slept, how many hours did the computers have to work to go through these half a million pages?

THE WITNESS: It would take in general on the order of approximately three weeks of non stop computer time, so perhaps on the order of 700 to 800 computer hours to process the entire half million list through one of the internet blocking programs.

So, we're talking about several thousand hours of computer time.

JUDGE BECKER: But you were able to set this up so it could do it while you were sleeping?

THE WITNESS: Right, I could be out of the country while it was doing this work.

BY MS. BEESON:

Q Did you periodically check the computer programs to ensure that they were functioning properly?

A I certainly did. I found it important to verify that the systems were operating properly, each morning when I woke up, and I found it often entertaining to find that nights examples of over-blocking.

Q Did you document every web page that found to be blocked by the programs?

A I did not.

Q Did you actually exclude some of the web pages that you found?

A I did.

Q And how did you do that?

A My goal was to document not just instances of blocking, but instances of over-blocking, which is to say, if a web page was blocked but the web page actually contained sexually explicit content, that would not be a helpful thing for me to tell the Court about today.

Instead, I needed to prepare a list only, to the extent possible, of web pages that were blocked but that did not, in fact, contain sexually explicit content. Certain of the Yahoo! categories were not helpful for this reason.

For example, if Yahoo! has a category like business and economy, entertainment, sex entertainment, adult entertainment, that would be a category that I would expect not to be helpful to me in documenting instances of over-blocking, and I would exclude all of the pages that I found to be blocked from that category because it was almost certain to me that any page that Yahoo! said was adult entertainment would not be a good example of over-blocking.

Q Did you exclude site in any other way?

JUDGE BECKER: Did you make a determination as to over-blocking as you have described it simply from the logs or did you have to visually inspect the site?

THE WITNESS: I ultimately made what you might call probabilistic judgment as to over-blocking, which is to say I was aware that most sites in Yahoo!'s adult entertainment category would not be examples of over-blocking. And I, therefore, removed—

JUDGE BECKER: You mean that they would be examples of proper blocking?

THE WITNESS: That's right, they would be examples of proper blocking, I would expect.

So I would remove all of those web pages immediately.

BY MS. BEESON:

Q And so you removed the web pages, though, without actually checking to see whether contained sexually explicit content?

A Without looking at them. I had no interest in looking at hundreds of pages of sexually explicit—

JUDGE FULLAM: How about the others?

THE WITNESS: The others were sent in part to two of the librarian experts in this case, Ann Lipow and Michael Ryan—

BY MS. BEESON:

Q I'm sorry—go ahead and answer. I think Judge Fullam may have been asking you a different question.

MS. BEESON: Were you asking about the other exclusions, Your Honor?

JUDGE FULLAM: The question was—somebody asked him how he determined, did he look at the web pages, and he told us the ones he didn't look at. I want to know if he looked at other web pages.

MS. BEESON: That's right. Sure.

BY MS. BEESON:

Q Go ahead, then.

A Sure. I did look at many of the other web pages. In general, my purpose in looking at them was to verify that my procedure was more or less on track. And, indeed, if I found a page within Yahoo!'s government hierarchy that was blocked by an internet blocking program, there would be good reason to investigate.

After all, if the page is categorized by Yahoo! as governments, United States, Federal Government, U.S. Courts, but it's classified by N2H2 as pornography, there may be something of interest here. If Yahoo! says it's a U.S. Court and N2H2 says it's pornography, that's an interesting divergence.

Q And did you also exclude other sites from your database?

A I did exclude certain other sites.

Q And what were those?

A I excluded any site that Google placed in the adult hierarchy of its directory, again because sites that Google said were adults were not likely to be convincing or helpful examples of over-blocking. And I further excluded certain specific web sites provided to me on a list by counsel for the plaintiffs.

Q Are all of the web pages —

JUDGE BECKER: What did the log look like, or what did the log say? Could you draw us a—if you don't have it, could you draw us a typical log entry?

THE WITNESS: I think I can read one to you easily.

JUDGE BECKER: Well, that would be fine.

THE WITNESS: So the logs were quite simple, they were ordinary text files with a number of lines, each line containing two pieces of information. First it would contain the URL that was tested. For example, it might say http://www.sexybloomers.com.

And then it would contain an indication in a certain sort of a code, but still a clear and unambiguous indication as to whether that site was able to be retrieved through a particular blocking program, or whether access to that site was prevented by the internet blocking program.

So in the case of sexybloomers, it might tell me access had been prevented to this flower store as it turns out that it just happens to be called sexybloomers.

The log itself is then a text file that I ultimately reprocess and reformat for the Court in Appendices A and B which will—

JUDGE BECKER: So how did you determine that sexybloomers—sexybloomers' web page was for a flower store and not for some explicit magazine, sexually explicit magazine?

THE WITNESS: Certainly the Yahoo! directory classification would be helpful in that regard if Yahoo! places it in business and economy, retail, flower stores, Michigan, Ann Arbor, Michigan, Sexy Bloomers Flower Store, that's a helpful piece of information.

JUDGE FULLAM: Does anybody look at the site, the page?

THE WITNESS: The sites were reviewed in several different ways. And I will tell you about each in turn.

First, a number of the sites, some 400 odd sites were reviewed by two librarians retained by the plaintiffs, Ann Lipow and Michael Ryan who reviewed each of those 400 sites in a particular way with what I take to be a very rigorous standard for appropriateness for use in one of their libraries.

Secondly, Joe James, who you heard from last week, reviewed a substantial portion of my resulting 6,777 distinct sites, and he, with the help of some of his students, was able to determine the number of those sites via probabilistic inference that, in fact, were examples for over-blocking.

Finally, I looked through many of the sites myself, knowing that these other experts would be looking at

large numbers of the sites. It was less important for me, not being a librarian in any case, to make a judgment as to whether these were examples of over-blocking. But I did come to the conclusion that many of the sites for which I documented the fact of blocking were, in fact, examples of over-blocking.

BY MS. BEESON:

Q If you could look now at plaintiffs' Exhibit 121, page 11, and explain to the Court what the table at the very bottom of the page shows?

A I documented a total of 6,777 distinct web pages, each of which was blocked by at least one of the four blocking programs tested, N2H2, Smart Filter, Cyber Patrol, and Web Sense.

The numbers in the right column there under the heading Total are the number of specific web pages of those 6,777 that were found to be blocked by the corresponding programs. For example, you can see that N2H2 was found to block 4,961 of the web sites on my list.

Q And if you could now look at page 12 of that same exhibit and identify the table at the bottom of the page?

A Some of the web pages on my list were blocked by multiple internet blocking programs. This table reports how many of those specific sites were blocked by multiple programs.

For example, you see that 1,287 of the URLs on my list were blocked by exactly two internet blocking programs in my test.

Q How did you record the content on the web pages that you found to be blocked?

A I used a commercial archival program called Teleport Exec in order to make a copy of the web page as it stood within, in general, 72 hours after I verified that each page was blocked.

So the procedure was as follows: First, I would use my automated testing system in order to verify that each page was once again blocked. I tested each of these pages in my appendices multiple times, and a final day, as I recall, on approximately September 15th, I went through the whole list and made sure that they were all still blocked.

Then, within three days of that time, I used the Teleport Exec archival program to make a digital copy of the respective web pages as they stood at that time.

Q Could you please now refer to plaintiffs' Exhibit 122 and 123?

A These are CD ROMs that give digital copies of the lists of sites that I found to be wrongly blocked, as well as copies of the archives of those sites as they stood immediately after I verified them to be blocked.

Q How do you use the CD?

A If you put one of these CDs into an ordinary computer running Microsoft Windows, my apologies to those who use MACs or something else. A web browser will load automatically, with a table of contents of the information available on that site. I'm sorry, on that CD.

If you click through to, for example, the version of Appendix A on the first CD, Exhibit 122, you will be able to view the archives of the web sites listed on Appendix A.

Q If you could now refer to plaintiffs' Exhibit 124 and tell the Court what that is?

A This is the table of contents page that loads automatically when you insert the first CD into a computer.

JUDGE BECKER: This is a printout of it?

THE WITNESS: That's right, it's a printout of that page.

BY MS. BEESON:

Q And if you could turn to the next page of that exhibit and explain what that is?

Actually, I'm sorry, if we could now go to the fourth page which at the very top in the right-hand corner says page 1 of 56.

JUDGE FULLAM: Page 1 of 56.

JUDGE BECKER: Page 1 of 56?

JUDGE FULLAM: At the top it says that.

THE WITNESS: This is a printout of one of the web pages available on the first CD appendixed to my report.

BY MS. BEESON:

Q And what is this entire list, this pages 1 though 56?

A These 56 pages given information about a particular subset of the list of web pages that I found to be wrongly blocked.

Q And are these the web pages that you sent to Ann Lipow and Michael Ryan?

A They are.

Q Okay. If you could just go down to the fifth entry which says Aberdeen Independent, and we're just going to walk through and explain to the Court what each of these entries is.

What does that first line mean, the one that says number five, Aberdeen Independent?

A The first line there gives the title of the web page at issue as provided by the author of that web page in the web page. It also gives an automatically generated number, that's the number preceded by the pound sign, that's produced by my database. It's really not of any particular interest to the Court.

Q What does the second line of the entry indicate?

A The second line provides the URL to the web page at issue in this number five, the URL for the Aberdeen Independent.

Q And what happens if you're using the CD and you click on that link?

A If you have this CD in your computer and you click on the link that says aberdeenindy.co.uk, the resulting image in your web browser will be the web page of the Aberdeen Independent as it stood within 72 hours after a final determination that that web page was blocked.

Q So just to be clear, you will be looking at the archived copy of the web site as opposed to the current version?

A That's right. You will be looking at content retrieved from the CD which reflects the site as it stood in September of 2201. It will not be content retrieved from that site's web server as it stands now.

Q And there's also some text on that same second line that says Current Web Version. What does that show?

A The link entitled Current Web Version will allow you to see the page as it stands now should you be so inclined.

Q So what will actually happen if you click on that text and you have the CD open?

A If you click on the link entitled Current Web Version, the current version of that page will be retrieved from that page's web server on the internet. So if your computer in fact has a connection to the internet, you will be able to view that page as it stands at this time.

Q What does the third line tell us, that begins Blocked by?

A The third line indicates the specific blocking programs that were found to constrain access to the given web page as well as the substantive categories for which access was prevented, and—

JUDGE BARTLE: What are the dates there? Are they the three dates when you tried it and blocked all three times?

THE WITNESS: The dates listed on the blocked by line are dates in which the page was tested and found to be blocked by the given program.

JUDGE BARTLE: Three times.

THE WITNESS: For some sites, I tested more than three times; for a few, as few as one. But in general, the vast majority, I would say 98 percent or more, were tested at least two times. And many of them more than that, as you see from just looking through this first page.

BY MS. BEESON:

Q And in this entry, the number five, it shows that the site was blocked by just one product, but do you also indicate it if it's blocked by more than one?

For example, if you look up at number three in the blocked by line.

A Yes. If the site was blocked by more than one product, the blocked by line would expand perhaps even to multiple lines if needed.

For example, you can see that the Rewind classic rock band was blocked by, in fact, each of N2H2, Smart

Filter, Cyber Patrol, and Web Sense on a large variety of days, some three or four distinct days.

Q Okay. Now going back to example number five, just for consistency, the next line that says Yahoo!, what does that tell you about the site?

A The next section entitled Yahoo! Gives, perhaps on several lines when needed, the one or several Yahoo! categories in which that URL was found to be placed. This is helpful in getting a sense of what kind of content the page most likely contains.

If you think Yahoo! was right about the page's contents, then you can look at this section and see that the Aberdeen Independent is probably a newspaper in the United Kingdom.

Q What does the next section that begins Google tell the Court?

A Google provides an electronic directory service much like Yahoo!. This is not Google's primary function. Google is primarily a search engine, but they do also offer a directory with the hierarchical classification.

When they classify one of the URLs listed in my appendices here, I provide that classification in the line preceded with text Google.

Q And what is the final line of text in that entry for number five?

A Some web pages provide a brief description text, again in a designated portion of the web page that's not ordinarily viewed by web browsers. I retrieved that

contents when it was available and included it as the final section in each record in the appendix here.

JUDGE BARTLE: Well, did it turn out to be a Scottish newspaper?

THE WITNESS: I am certain that this turned out to be a Scottish newspaper, yes.

BY MS. BEESON:

Q If the entry for a particular site does not include the Google information and the textual information at the bottom, what does that mean?

A If the page does not include the Google director classification, then the proper inference is that at least as of the time of my retrieval of this information in September and October of 2001, Google did not classify that URL.

If the page does not include a description, then similarly the description section at the bottom of each reference here in the appendix would also be omitted.

Q Just to be clear again, both the information in the final line of some of these entries and the information on the very first line is information provided by the publisher of the web site itself, is that right?

A That's correct.

Q Okay. Referring back to the CDs for a moment. What is the distinction between plaintiffs' Exhibit 122 and 123, the two different CDs?

A It was thought to be desirable to the extent possible to archive not only the specific web page that I

had found to be blocked, but a number of the other web pages that are linked from that page.

For example, had I found this Court's web site at uscourts.gov to be blocked, you might want me to archive not just the front page that I had verified to be blocked, but all of the linked pages in order to verify should you be so inclined at some later date that none of those linked pages contained any sexually explicit content either.

However, it turns out that archiving such a large number of pages takes quite a bit of disk space and it would be infeasible to archive six or 7,000 web pages along with all of the linked pages.

For that reason, we chose a subset, these 400-odd pages listed in Appendix A, for which we've archived or attempted to archive all of the linked pages. And for the remaining 6,300-odd sites, we archived only the specific page for which blocking was verified.

Q So for plaintiffs' Exhibit 122, which was also Appendix A to your report, there is a fuller archive of the sites on that disk than there are plaintiffs' 123?

A That's right. The web pages listed in Appendix A are in general archived along with reasonable or a large number of their linked pages, whereas those pages archived on Appendix B on the second CD are archived only in specific pages that were found to be blocked.

Q And when you say you archived the links to the sites on Appendix A, you just mean the internal links to the site, is that right?

A That's right. I mean only the links to other pages on the same web server, in fact in nearby portions of the same web server, not links, for example, to entirely separate web sites hosted elsewhere.

Q Was all of the content on the pages successfully archived?

A Unfortunately it wasn't. It turned out to be a difficult job even for a reasonably expensive and sophisticated commercial program like Teleport Exec to properly archive the way a web page appears in your web browser.

It's unfortunate that this is such a hard job, but the program did not succeed in doing it perfectly in all instances. However, in the vast majority of instances, it did capture an intelligible archive that provides a good representation of how the page stood at the time of blocking.

Q I believe you testified that you sent some of the information to Dr. Joseph James, too. Could you tell us specifically what information you sent to Dr. James?

A I sent Dr. James a listing of all of the specific web pages that I had found to be blocked. I sent him just the URLs of those web pages in an Excel file as it turns out.

Unfortunately, in sending it, I removed three of the URLs from it accidentally and added one more, so there's a very, very small divergence that's of no particular significance ultimately.

Q I would like to now refer you to plaintiffs' Exhibits 165 through 169.

JUDGE BECKER: Which volume is that in?

MS. BEESON: It's actually —I've got some folders for you, Your Honor.

JUDGE BECKER: Okay.

(Pause in proceedings.)

BY MS. BEESON:

Q Mr. Edelman, I believe you testified earlier that you did personally review the content of some of the sites that you documented. Can you tell us again about how many sites you reviewed personally?

A I reviewed all of the sites listed in Appendix A, and that's some 400-odd sites. And additionally, I reviewed several hundred of the sites from Appendix B.

Q Could you now look at these exhibits, plaintiffs' Exhibit 165 through 169 and tell the Court what these are?

A Sure. The first plaintiffs' exhibit, 165, is a web page entitled Learn to Play Piano and Write Songs in Three Lessons. I see from the bottom of the printout this comes from a server called helmbros.com.

My notes reflect that it was previously blocked in my initial testing of 2001 by Web Sense in the category of sex. And it is now blocked, according to my retesting of March 2002, by N2H2.

And as I look at it, at least at this particular page, I can note that it doesn't seem to include any sex or any sexually explicit content. It seems to contain only song-

writing and piano-playing lessons. So it would be, it seems to me, a good example of over-blocking.

Q And are these exhibits printouts from the archived version of the web site, and if so, how do we know that?

A These are exhibits from the archived version of the web site. And we know that because looking at the bottom of the printouts, you can see that the URL references there are not the ordinary URL references that you would see if you printed the web pages from the internet, but rather references to a file stored on an M drive, which could well be—almost certainly is because of this pattern of the site's directory followed by the directory of the web server name. This is a file from the second CD, for the appendix to my initial report.

JUDGE BECKER: What's the M drive? What's meant by the M drive?

THE WITNESS: The M drive is one possible convention for the CD ROM drive in a personal computer. So it reflects retrieval of content from an ordinary CD ROM disk.

BY MS. BEESON:

Q Could you tell us what you found out about plaintiffs' Exhibit 166 and how it was blocked?

A Plaintiffs' Exhibit 166 is a page entitled Lakewood High Alumni. My notes reflect that it was previously blocked by N2H2 for being in the category of nudity and it is still blocked by N2H2.

Q What about plaintiffs' 167?

JUDGE BECKER: Do you have an opinion as to why either of these were blocked by N2H2? Is there some flaw in the N2H2 system or—I mean, these are plainly not sexually explicit or what have you.

THE WITNESS: These first two seem to be, to our first approximation, randomly blocked. They are not blocked because their address is confusing, say Sexy Bloomers that we discussed previously might have been blocked because its address with the word sexy was confusing.

They're not blocked because their contents are confusing. There's no talk of breasts or breast cancer on the page.

JUDGE FULLAM: But the talk of fingering and frustration is the only thing I could figure out about this one.

THE WITNESS: That is one possibility that some key word on the page triggered erroneous blocking, presumably by a computer. It seems to me unlikely that a human would make this mistake.

Another possibility is that the error is, to a first approximation, random. You heard last week about the possibility of over-blocking on the basis of shared IP address hosting, which is, primarily could be thought of as essentially random from the perspective of most internet users and most content providers.

But just as a result of where your web server happens to be located and what other content is nearby on the internet, the entire neighborhood might be

categorized as pornography by, say, N2H2 even when numerous, in fact most specific pages in that neighborhood are not pornographic.

JUDGE BARTLE: Guilt by association.

THE WITNESS: It would seem to have a certain analogy to guilt by association.

JUDGE BECKER: Mechanically how does that happen. How does the blocking—the filter captures nearby sites as it were or—

THE WITNESS: Here's how it might happen. When you type a URL into your web browser for a page like, for example, helmbros.com, your web browser initially asks an internet server in fact one maintained by the internet corporation for assigned names and numbers that I spoke of previously, or by one of its delegates and asks to convert that page name, helmbros.com into a numeric identifier, an IP address, these are the dotted numbers one dot, two dot. three dot, four dot, that you heard about last week.

Those numbers reflect particular servers that might host many domain names. For example, helmbros might use the server one dot, two dot, three dot, four and a pornographic site, a site offering adult entertainment content, might in principle use that same server.

If, for example, the server was a server available for commercial hire for $30 a month, you could put your site on that server also, which turns out to be a generally accepted practice used by many individuals in many small businesses.

In that case, if the blocking program prevented access to that server on the basis of its IP address, then it would necessarily prevent access to all other content hosted on that same server.

JUDGE BARTLE: Which could be thousands of—

THE WITNESS: Thousands, even tens of thousands or millions of pages.

JUDGE BECKER: So any filtering system that is structured or configured that way ia destined to block—to over-block?

THE WITNESS: Any filtering system, any blocking system that prevents access on the basis of the web servers IP address is certain to produce large amounts of over-blocking of precisely this sort, that's correct.

JUDGE BARTLE: Is that what these filtering systems do, do they all block on that basis?

THE WITNESS: I have reviewed the technical documentation and the advertising of the four programs we've spoken about, and each of them reflects in its documentation the ability to block pages both on the basis of their IP address and on the basis of the domain name.

JUDGE BARTLE: Well, you say ability, but the question is do they do it?

JUDGE FULLAM: He doesn't know.

JUDGE BARTLE: Certainly the fact that the page is and was blocked seems to me clear evidence that they

must be doing it because I can think of no other sensible, logical reason why this page would be blocked.

Furthermore, I can think of good reasons, economic reasons resulting from their need to make money, their need to economize on the use of staff, keep their staff small, and to keep their sufficient why they might find it helpful to block on the basis of an entire IP address rather than just by domain name.

JUDGE BARTLE: And it would serve the purpose of the customer because you would be sure that pornography or explicitly sexual was block may—may overblock, but at least accomplish the purpose of keeping the pornography off the internet or off the—

THE WITNESS: Off the library for example.

JUDGE BARTLE: Yes.

THE WITNESS: It's two that when you use IP address blocking, you're likely to be somewhat more successful in preventing access to sexually explicit content given a particular fixed amount of staff resources, for example.

JUDGE BARTLE: It's still like throwing out the baby with the bath?

THE WITNESS: It's very efficient to throw out the baby with the bath, that's right.

BY MS. BEESON:

Q Just quickly, Mr. Edelman, if you could refer to plaintiffs'—

JUDGE BECKER: If the blocking was by—

MS. BEESON: I'm sorry.

JUDGE BECKER: —domain name, why wouldn't this have happened?

THE WITNESS: If the blocking were by domain name, then the blocking company would have prevented access only to the particular single or several sexually explicit web pages that might be using this IP address.

The problem though from the perspective of the blocking company, is that there might be several, there might be even a couple dozen, I venture to say there might be a hundred different domain names pointing to a particular web server, and of those, maybe ten or twenty would offer sexually explicit content conceivably on some web servers, such that it might be more convenient from the perspective of the blocking company to block the entire server in one fell swoop rather than having to add 20 different lines for the 20 different domain names.

It's as if I said in a particular area code there are so many different people offering pornographic content, I'll just block the whole area rather than all of the particular different phone numbers in that area code.

JUDGE BARTLE: Just from the economics of the standpoint of the filtering company, they are almost compelled to do this, right?

THE WITNESS: Certainly it seems that it would make their operations quite a bit more efficient. With more resources I'm sure they—

JUDGE BARTLE: It's less profit.

THE WITNESS: —it seems likely they could do better. It wouldn't mean less profit, I would think, to block on a more granular level.

JUDGE BECKER: But why would there be a confusion if they block by domain name? Is that because of similarity or ambiguity in domain names?

THE WITNESS: If they blocked by domain names but a particular provider of sexually explicit content had many domain names, 20 or 30, and it could be hard to find out all of the different domain names that a particular individual has registered just because the internet isn't indexed that way, it becomes a much more difficult undertaking to find out all of the different domain names that host sexually explicit content as against all of the different IP addresses.

JUDGE BECKER: So it would take—

THE WITNESS: There are more domain names out there.

JUDGE BECKER: —visual inspection of each? Would it take visual inspection?

THE WITNESS: I think visual inspection would be required either way, but more visual inspection would be required of more distinct domain names if you were going to block on the basis of domain name rather than on the basis of IP address.

JUDGE BECKER: Yes, Ms. Beeson.

BY MS. BEESON:

Q Mr. Edelman, if you could just briefly summarize for the Court Plaintiffs' Exhibit 167 and how you found it to be blocked?

A Plaintiffs' Exhibit 167 is a bit different actually from the last two we talked about. Like the last two, it was previously found to be blocked in this instance by Cyber Patrol for presence in the adult sexually explicit category.

However, looking at Exhibit 167, it seems to me that it was likely confusing on a key word basis or perhaps on a domain name basis to some automated system, a key word filter more or less, so all the word women in the title of this web page and thought oh, this must be sexually explicit content because it has women in its title.

Now, in fact, I gather this is a sort of trade association for women who are in the cinematography business, making movies or providing technical assistance to those who do make movies.

But the presence of the word women in the page's title and in the page's domain name perhaps triggered some sort of automated system that classified this page as adult sexually explicit by Cyber Patrol which, of course, we see from looking at it, it is not.

Q What about Plaintiffs' Exhibit 168?

A Exhibit 168 is a page provided by Calgary Firefighters Museum. It was blocked, according to my notes, by Cyber Patrol for being adult or sexually explicit, and as I had looked through it, it seems to me

that it is not adult or sexually explicit. It only provides information about the events of the particular Calgary Firefighters Museum.

Q And Plaintiffs' Exhibit 169?

A Exhibit 169 is a web page about some aspect of politics in Uganda. It's about an organization that they say is not a party, it's not a religion, but it's something about political organization in their country.

I am not sure I have read it quite carefully enough to understand completely, and it was blocked by N2H2 for membership in the category of adults only and pornography in my testing of 2001, and is still so classified as of March 2002.

Q Mr. Edelman, after you submitted your initial expert report in October of 2001, did you publish those findings in any way?

A I did. I put the contents of the C Ds on my personal web site at the Berkman's Center at Harvard Law School. I asked staff at the Berkman Center promote the publication of my work on the front page of the Berkman Center in our periodic newsletter and otherwise to students in related classes, and I sent information about my report to mailing lists for which subscribers I thought might well be interested.

I also know that certain mailing lists of librarians forwarded on the announcement of my report to their members.

Q After your initial report, I believe you mentioned previously that you checked again recently to see

whether the sites were still blocked. When was that research conducted?

A It was conducted in March of 2002.

Q And could you refer now to Plaintiffs' Exhibit 126 which I think is the first exhibits, Your Honors, in volume two of the Multnomah binder.

(Pause in proceedings.)

Q And what is that?

A Plaintiffs' Exhibit 126 is my supplemental expert report.

Q And if you could look at page two of that exhibit in the first table at the top of the page, what does that show?

A The table at the top of page two details the number of specific URLs that were previously blocked by each of N2H2, Surf Control and Web Sense, and it further notes the number of URLs that are currently blocked, again of those 6,777 URLs in my appendices by those three programs.

Q And could you look at the table at the bottom of that same page—

JUDGE BECKER: Why did so many of them get unblocked?

THE WITNESS: If I can just describe the second table on this page—

JUDGE BECKER: Okay.

THE WITNESS: —it might make a little bit more sense at that point.

The second table on this page performs the same function as the first with the following exception. In the still blocked column, it now requires that the URLs that are still blocked, be URLs that were blocked by the same program previously. Perhaps I could give a specific example.

If sexybloomers.com was previously blocked by N2H2, then in order for that to be counted towards the total of N2H2 sites that are still blocked, N2H2 must still block that particular site.

If N2H2 comes to block some site that was previously blocked only by Surf Control but not by N2H2, that would not count properly toward the N2H2 still blocked total.

Now, the question was why so many URLs came not to be blocked any longer. Certainly when you look at Surf Control at the second table, you see that Surf Control elected to unblock fully 93 percent of the URLs I previously reported as wrongly blocked by Surf Control.

BY MS. BEESON:

Q Did this—

JUDGE BARTLE: They had word of what you had done?

THE WITNESS: In fact, they had looked at my report in the first 24 hours I recall after I published it. At that point, I was still monitoring every view of the

report that I verified that an employee of Surf Control had actually retrieved my report.

BY MS. BEESON:

Q And just to be clear, Mr. Edelman, I think that that table shows—it distinguishes the URLs reported in appendices A and B, is that right?

A It does.

Q And what are the results for the Surf Control correction rate for the URLs in Appendix B which are the URLs sent to Dr. Janes?

A For the URLs—first, as I recall, Dr. Janes received both appendices A and Appendix B.

Q That's right, I'm sorry.

A So for Dr. Janes I suppose the proper column to compare is the percent still blocked column under the heading total, the right most column.

Q That's right.

A And here we see that 7.16 percent of the sites previously blocked by Surf Control were still blocked by Surf Control in March of this year which leads me to conclude that the other 93 percent were no longer still blocked, which must have acquired some affirmative change on Surf Control's part, which is to say they decided to change the configuration of their program, so as not to block the other 93 percent of sites that I initially said were wrongly blocked.

Q Did you reach any other conclusions based on your supplemental research about the ability of the programs to correct over-blocking?

A I did.

Q And what are those conclusions?

A I was surprised to see that N2H2 and Web Sense had not corrected the majority of the over-blocking that I had reported in my initial report and its appendices.

Q Why were you surprised?

A I had published my report to the public, I publicized the publication of the report on the internet on a number of mailing lists that I would expect staff of those companies to find errata, errors of their programs.

So it was puzzling to me, surprising to me that in fully seven months between when I published my report listing thousands of errors of their programs and my retesting in March, in that seven-month period they did not, were not able to, or were not inclined to correct the errors detailed in my initial report.

Q What conclusions did you reach overall about the amount of over-blocking caused by the four programs you analyzed?

A I concluded that there is significant, substantial over-blocking caused by these four programs when configured as I configured them.

Q And why do you believe that you documented significant over-blocking?

Q First, a list of some six to 7,000 distinct pages from many many distinct web servers, distinct domains, that alone to me is a significant list. That's thousands and thousands of pages which is significant and substantial.

Furthermore I am certain that the way I proceeded in conducting this research excluded the vast majority of those sites that are wrongly blocked. For example, I began only with those specific URLs that were in Yahoo! or that Google reported to me as related, a sample of only half a million URLs out of billions, hundred of billions perhaps of URLs on the internet.

I began with only a tiny tiny portion of the internet and found thousands of examples of over-blocking in that portion. Had I begun with a larger portion of the internet, I am sure I would have found more samples of over-blocking.

Furthermore, my criteria for inclusion in these lists were, in some ways, stringent. I needed to verify that the site was blocked on multiple occasions, and I needed to be able to archive the site within 72 hours after the final occasion of testing.

If I was unable to archive it, I would have to omit that site from reporting in my appendices here, which is to say I excluded many hundreds or thousands of additional sites on the basis of their unreachability when I wanted to archive them, or on the basis of their failure to continue to be over-blocked even though they were over-blocked at one point in my testing.

Q And just to clarify, when you configured the products, you did not engage all of the possible categories to block, did you?

A That's correct. I configured them only to block the specific categories listed on page four of my initial report, and I understand some libraries might configured their blocking software to block additional categories.

Q Did you reach any conclusion about the persistence of over-blocking?

A I did.

Q What is that?

JUDGE BECKER: If you had configured to block tasteless and gross which is one of the categories of one of the—would that have been more difficult to determine over-blocking with respect to—

THE WITNESS: My methods would have been perfectly able, I believe, to produce a list of a large number of web pages that were blocked under any, all, or any combination of the categories present in the blocking software.

The actual judgment as to whether a page met the definition of tasteless or gross, would I suppose turn on how precise the definition of tasteless or gross is, and some of the definitions as written by the staff of the blocking companies are, in my experience, more precise than others, which is to say that there are some that I found bordering—to border on unintelligible or unclear.

Luckily the ones at issue for my report by and large were clear enough to me that I was able to make a determination in general.

BY MS. BEESON:

Q What have you observed generally about the various types of over-blocking?

A I have observed that there is significant over-—blocking in each of the types over-blocking identified by Mr. Nunberg last week.

Q Now, I want to just ask a few questions about the general features of blocking programs.

We have heard some testimony about how some of the products provide the ability to check a particular URL to see whether that product blocks a URL and they have that feature on their web site. Are you aware of that feature generally?

A I am.

Q Do you know whether Web Sense has such a feature?

A Web Sense does have such a feature, however the feature on Web Sense is different from the feature on the sites that the other three blocking programs in what I think may be an important respect.

In order to use the Web Sense feature on their web site to determine free of charge whether a particular web page is classified by the Web Sense blocking program, you must establish an account with Web Sense wherein your provide them with your name, your

E-mail address, your phone number, your organizational affiliation, whether or not you're currently a Web Sense customer, whether you evaluating Web Sense, whether you only seek to determine how Web Sense classifies a site that you operate, or that you are interested in.

Then you must certify to a paragraph of legal text, I'm no lawyer but I read the text and think I understood at least a portion of it, in which you certify that you will not transfer your user name and password assigned to you Web Sense, that you will not use this information from Web Sense to disparage the product or criticize its quality.

That you will use the information only for the purpose of finding out and not even telling anyone, but just finding out for your own personal knowledge how Web Sense classifies a particular URL.

You must agree to all of that in order to use the feature on Web Sense's site.

JUDGE BECKER: When you say you must read just click yes?

THE WITNESS: You must read the text and say I certify —

JUDGE BECKER: I certify.

THE WITNESS: —this is true and press the button that says I agree, yes.

JUDGE FULLAM: You think that is an important distinction?

THE WITNESS: It caught my eye because I wouldn't haven't been able to make that certification honestly or truthfully had I needed to use that particular feature on the Web Sense site.

JUDGE FULLAM: They don't require the certification be made under oath though, do they?

THE WITNESS: I suppose they don't. I should get some advise from the three of you as to whether or not I could properly make the certification in that case.

BY MS. BEESON:

Q Can blocking programs block just sexually explicit content on web based discussion groups or chat groups?

A They cannot.

Q Why not? What can they do?

A They could in general block the entirety of a given discussion group preventing access to an entire discussion on a given topic, but they could not in general prevent access to a particular single message in that discussion group.

And if there were a particular image of interest at issue in a particular message in general they would have no way to block only that particular image without blocking the rest of the message or other messages in that same forum.

Q Can blocking programs block just the sexually explicit portions or audio or video content delivered over the web?

A They can't. First, it's difficult to block audio and video content delivered over the web just in the sense that the content is offered—often delivered in proprietary formats that are not as amenable to the sorts of blocking methods used by these blocking programs to restrict web access.

Furthermore, it is especially difficult to block access only to particular portions of an audio or video file. For example, if you managed to find a digital copy of the movie Titanic on the web, that could be a tricky thing to do actually, but if you found a copy of the movie on the web, there would be no way for the blocking software to prevent access to a particular sexually explicit scene in that movie because the movie, if you manage to access it, would be retrieved in its entirety and displayed to you in its entirety.

There is just no way for a blocking program to get in the middle and prevent access to the one possibly sexually explicit scene in that movie.

Q Did you also test the customization features offered by the programs?

A I did.

Q And how did you do that?

A I configured each of the programs to block access to a web site that they would not ordinarily have prevented access to, and I further configured each of them to allow access to a web site that they would not ordinarily have prevented access to, and I further configured each of them to allow access to a web site that they ordinarily would prevent access to.

For example, I configured the programs to block access to a particular site at Harvard and to allow access to a particular site at say Playboy.

Q What customization features are provided by the program?

A Each of the programs provide some ability to customize the ordinary categorization list provided by that program. For example, if you wanted to add another site to adult sexually explicit category within Cyber Patrol, you could certainly do that.

Q What level of technical expertise do they require for operations?

A As I reviewed the manuals for these blocking programs and as I reviewed the way that they become installed on a central server that actually performs the act of blocking access to web pages, it seems to me that these programs were targeted at systems administrators of computer networks, your IT guy loosely speaking.

They did not seem to be targeted at librarians in the sense that there was no way, for example, to provide a simplified or customized user interface to the customization features such that a librarian would see only the features of use to the librarian without seeing all of the other features important to an assistant administrator.

JUDGE BECKER: You said that you were able to effect a modification?

THE WITNESS: I was able to.

JUDGE BECKER: That's because of your technical expertise?

THE WITNESS: My technical expertise allowed me to operate the software in the necessary way, and I'm sure some librarians will be perfectly capable of doing so.

But my conclusion after reviewed the programs, after looking at them, testing them on my own computers, reading their manuals is that the authors of the programs intend for a systems administrator, a person who perhaps has some professional certification in the operation of computer networks to do the customization of these programs, as well as to configured them in any other necessary way according to the requirement of the specific installation.

BY MS. BEESON:

Q Are the customization features designed to be operated by a single systems administrator?

A In general the manuals and technical documentation for these programs seem to anticipate that a single systems administrator would configured the programs from a single internet terminal.

Ordinarily the server itself which is to say if you wanted to change the configuration of the blocking server, you would walk over to the blocking server which would perhaps be in a closet in your office. You would sit down at it's console, and use it's screen key board and mouse in order to change it's configuration. They anticipate that one particular person would do that when necessary.

Q Would it be possible to use four multiple systems administrators to grant exceptions using these programs?

A For some of the programs that might be possible. I didn't actually test that and in general their documentation just doesn't speak to the question one way or the other.

I did, however, read the technical documentation of Surf Controls Cyber Patrol product which explicitly speaks to this practice and says that it is a bad idea. They say that it risks completely corrupting the configuration of the blocking server, and it risks rendering the server inoperable and your internet connection then unusable.

In short, they say that it's important not to use multiple simultaneous administrators configuring the server, because if you do that the server might stop working.

JUDGE FULLAM: Is configuring the server the only way that you could override a blocking?

THE WITNESS: Yes, overriding block or customizing a category list is one kind of configuring the server and I can think of now way to override a block other than by configuring customizing the blocking server.

BY MS. BEESON:

Q Assume that a customer—

JUDGE BECKER: So are you—

MS. BEESON: I'm sorry.

JUDGE BECKER: That's all right. Well, we heard testimony from several library mangers about their ability to effect overrides. Are you in effect challenging that testimony saying that they didn't have the capacity or that they would have had to violate the protocols of at least some of the filtering companies if they did so?

THE WITNESS: I haven't read the transcript of that testimony I'm afraid, but I am confident that none of the manuals that I read spoke to this question one way or the other. Which is to say they didn't say you could do it, and they didn't tell you how to do it. Which to me is a pretty clear indication that the authors of the software weren't anticipating that you would do it.

BY MS. BEESON:

Q And Mr. Edelman, just to clarify, you weren't saying that it's not possible to grant exceptions at all, are you?

A Certainly it's possible to grant exceptions. They have been unclear about this.

JUDGE BECKER: Well, if you were the main library manager in Greenville or Tacoma or Westerville Ohio, you would know how to do it?

THE WITNESS: If I were the main library manager I would absolutely certainly be able to grant exceptions.

The question is whether multiple library managers say in distributed branch libraries or on different floors of the library might separately be able to configured

the same blocking server at the same time to make different customizations.

JUDGE FULLAM: Is their distinction between an override which eliminates the block as to all computers from then on, or and one which simply says for this particular customer, this particular terminal for one day only we override?

THE WITNESS: The latter practice while it sounds easy enough and you're certainly able to describe it in a sentence, is not a feature that in my experience is actually included in any of the blocking programs that I reviewed.

JUDGE BECKER: So if you change it you change it for good?

THE WITNESS: You change it one for good, and two for everyone in general. One of the programs that I—

JUDGE BECKER: For everyone you mean in—

THE WITNESS: All terminals in the library.

JUDGE BARTLE: How about in terminals in branch libraries too, or can't you—you would have to do it separately in each of the branches I take it?

THE WITNESS: It would depend on the way your network was designed.

JUDGE BARTLE: So, if someone comes to the librarian and says I want to do bono fide research on pornography and the librarian agrees that what you're doing is bono fide research and the block is overridden then that's going to be overridden for all times. So that

anybody else can come in and get access to that web page.

THE WITNESS: I take you to be depositing the possibility of removing the block on one particular web page, or one particular site.

JUDGE BARTLE: One part one—yes.

THE WITNESS: Right. In most of the programs that I tested in N2H2 in Web Sense and in Smart Filter there is no particular way to customize the blocking list for a single computer terminal even for all times.

In Cyber Patrol it is possible to customize—

JUDGE BARTLE: Yes, but what I'm saying is let's assume the block is overridden and whatever configuration because somebody's doing bono fide research and that's an exception of the law, so that if someone convinces the librarian that he or she is doing that kind of research then the librarian will unblock the blocked material.

So, once that's done because that one individual was doing bono fide research then that whatever is unblocked is going to be unblocked permanently. It's not going to be reblocked after that person finishes he or her research.

THE WITNESS: None of the blocking programs that I tested and for which I reviewed the manuals and other technical documentation provides any notion of an expiring allow.

JUDGE FULLAM: Well, we've heard testimony that some libraries do not have screening for the staff computers. I take it if that's a possibility—

JUDGE BECKER: They don't have filtering.

JUDGE FULLAM: —they don't have filtering on their staff computers and therefore presumably this one time user could be permitted to use the staff computer to get—

THE WITNESS: That would seem to be one possible way to proceed. I don't know whether that would be compliant with the requirements of the law but it certainly seems technically possible.

JUDGE BECKER: Well, I take it that if they reconfigure then they could rereconfigure.

THE WITNESS: That's right. You could have a nightly job for someone to remove all of those customizations, although in fact—

JUDGE BECKER: And then recustomize, is it—

THE WITNESS: I suppose it would be necessary or it might be necessary for compliance with the law to remove the customization as soon as that patron leaves that terminal.

JUDGE BARTLE: That's what I'm saying, you can then.

THE WITNESS: Right. You could, you just would have to make sure you remembered and you weren't—

JUDGE BARTLE: Yes, I understand.

THE WITNESS: —busy doing something else. And there is also this important constraint that we discussed previously, wherein, remote administration by multiple librarians of a single blocking server certainly for Cyber Patrol you better not do it.

JUDGE FULLAM: It's frowned upon.

THE WITNESS: The manual is quite clear.

JUDGE FULLAM: Okay.

BY MS. BEESON:

Q Do any of the programs provide the ability to keep track of the exceptions granted, the exceptions granted to particular users and the reasons for granting those exceptions?

A None of the blocking programs that I tested has any understanding of the reasons why you decided to unblock the particular site, nor does nay of them have any particular method of producing an audit or other report of exceptions granted, so—

JUDGE BECKER: So, they had to do it manually?

THE WITNESS: They would need to keep some separate set of records I would think.

BY MS. BEESON:

Q If you could just briefly now, Mr. Edelman look at Plaintiff's Exhibit 125 which is in the first volume. It's the last one I believe, and just identify that for the Court?

JUDGE BARTLE: What page?

MS. BEESON: Just the report overall, Your Honors.

THE WITNESS: This is my rebuttal report.

BY MS. BEESON:

Q Okay. Given your research of blocking programs what is your opinion about whether they are likely to improve significantly in the future?

A I wouldn't think the blocking programs are likely to improve significantly in the future.

Q Why?

A I gather that they're current status reflects the best effort of the companies making these products subject to some significant constraints that they face. Among them the need to make a profit the need to have a reasonable size staff and to use staff that they're capable of hiring and retaining.

JUDGE BECKER: Don't you think Edelman can tell them how to do it?

THE WITNESS: This seems to me a difficult and fundamental problem for all the reasons that Mr. Nunberg explained last week.

JUDGE FULLAM: They used to say that airplanes would never get off the ground.

THE WITNESS: I wouldn't want to take on this job. I don't see myself dropping out of school to write a better program next month.

MS. BEESON: I have nothing further.

JUDGE BECKER: All right. We'll take a ten minute recess, and then we'll let you cross-examine.

(Court stands in recess, 10:41 until 10:56 a.m.)

JUDGE BECKER: Okay. You may cross-examine him, Ms. Bhattacharyya?

MS. BHATTACHARYYA: Thank you, Your Honors.

[CROSS-EXAMINATION]

BY MS. BHATTACHARYYA:

Q Mr. Edelman, your goal in compiling your list of sites was to find sites that had been wrongly blocked because the content of those sites was inconsistent with the filtering category definitions, isn't that right?

A That's correct.

Q No one not you and not any of plaintiff' expert actually looked at the content of the sites on your CDs to determine whether or not they were consistent with the filtering category definitions, isn't that true?

A No, I would not agree with that statement.

Q Dr. James didn't look at those sites in accord with the filtering category—

JUDGE FULLAM: Are you arguing with him or questioning him?

MS. BHATTACHARYYA: I'm questioning him, Your Honors.

JUDGE FULLAM: Will you ask him a question then, please?

BY MS. BHATTACHARYYA:

Q Are you aware of the methodology that Dr. James used to conduct his research?

A Having read his report I am aware of his—

Q And he did—

A —methodology?

A —not use the filtering category definitions as the touchstone for determining whether or not those sites had content consistent with those definitions, did he?

A He did not use that precise standard no.

Q And Dr. Ryan did not use that filtering category definitions to determine whether or not the sites he looked at were consistent with the category definitions, did he?

A He did not.

Q And Ms. Lippow did not use the filtering category definitions to determine whether or not these sites were over-blocking because they contained content inconsistent with the category definitions, did she?

A She did not.

Q And you did not examine every site on your CD to determine whether or not they contained content inconsistent with the filtering category definitions, did you?

A I examined some of the sites on the CDs that are appendices to my report, but I didn't examine all of the sites.

Q In fact you testified earlier that you examined maybe a few hundred of the thousands of the sites listed on your CD, isn't that correct?

A I testified earlier that I reviewed approximately 400 sites from Appendix A and on the order of several hundred from Appendix B which would total I think more like 700 more than a few hundred.

JUDGE BECKER: And what was the conclusion you reached from the visual inspection?

THE WITNESS: I concluded that the vast majority of those sites that I inspected visually were not consistent with the category definitions of the respective blocking programs.

BY MS. BHATTACHARYYA:

Q So, you reviewed approximately ten percent of the sites on those Cds and reached that conclusion, isn't that right?

A That's correct.

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[TESTIMONY OF B. EDELMAN]

[Apr. 2, 2002]
[p. 89]

* * * * *

JUDGE FULLAM: Do we have anywhere in either your original report or anywhere else your listing of the sites which you concluded were not in accordance or over-blocked under the company's own standards?

Which ones are they?

THE WITNESS: I reviewed the totality of Appendix A, so certainly we could look at Appendix A and I could tell you that I had, in fact, looked at every single site on that list.

For the longer Appendix B, I don't have records of which particular sites I looked at and so I would be unable to tell you and you cannot know which of the sites I looked at.

JUDGE FULLAM: But both Appendix A and Appendix B are sites which you concluded were over-blocked?

THE WITNESS: I concluded that a large portion of those sites, a majority were over-blocked. I didn't conclude, I absolutely did not conclude that every one of them is an example of over-blocking.

I am certain that there are sites with sexually explicit content, especially on Appendix B, I am certain that there are sites that are consistent with the block-

ing company's own category definitions on Appendix B in particular.

* * * * *

[TESTIMONY OF B. EDELMAN]

[Apr. 2, 2002]
[pp. 100-107]

[CROSS-EXAMINATION]

* * * * *

BY MS. BHATTACHARYYA:

Q Mr. Edelman, you testified that you ran 500,000 sites with these filters, is that correct?

A Approximately 500.

Q And of those 500,000 sites, you were able to identify the 6,000-some plus on your exhibit that were blocked, is that right?

A There were certainly plenty of other sites that were also blocked, but my exhibits report a portion of those sites that I found to be blocked.

Q The vast majority of the half a million sites that you ran through the filter were not blocked, isn't that true?

A I would agree that the majority of sites that I ran through the filter were not blocked.

JUDGE BECKER: And the only ones that you listed as blocked were ones that were blocked because of these categories, is that right?

THE WITNESS: The only URLs that I reported in Appendices A and B were those that were blocked by the specific categories listed on page four of my report.

JUDGE BECKER: Categories that you identified before.

JUDGE BARTLE: The four.

THE WITNESS: That's right. The categories on page four, Cyber Patrol, adult sexually explicit; N2H2, adults only nudity, pornography and sex, and so forth.

BY MS. BHATTACHARYYA:

Q And based on finding some 6,777 or so sites that were blocked, you concluded in your report that it's virtually certain that there are a large number of other sites on the internet that are also wrongly blocked, isn't that true?

A I concluded that there were a large number of other pages on the internet that were wrongly blocked on that basis, that's correct.

Q And that conclusion is not supported by any statistical inference, isn't that true?

A It's supported by a logical inference, but I wouldn't characterize it as a statistical inference.

Q You characterized it on direct as a probabilistic judgment, is that fair?

A Sure. I would say that it's a probabilistic judgment in the sense that I reviewed some subset of the world and made a judgment about the rest of the world which is—

Q Now—I'm sorry.

A Which is to me a probabilistic sort of a judgment.

Q Now, you corrected me a moment ago when I said sites and not pages, is that right?

A I did note a distinction, that's true.

Q When you turn to page 14 of your expert report, which is plaintiffs' Exhibit 121—

(Pause in proceedings.)

JUDGE FULLAM: What page are we on?

JUDGE BECKER: Fourteen.

MS. BHATTACHARYYA: It's page 14, Your Honor.

(Pause in proceedings.)

BY MS. BHATTACHARYYA:

Q This statement at the top of the page, "Thus, it is virtually certain that my research details only a small portion of sites that are wrongly blocked by the programs I have tested," that is your conclusion, is that right?

A That is certainly a conclusion that I reached on the basis of this work.

Q And that conclusion, in fact, refers to sites and not pages, is that true?

A It does.

Q This testing also indicates that—this statement also indicates that your testing began with a small sample of sites on the web. Is that fair? That's what the statement says.

A It does say that.

Q You didn't, in fact, select a statistically significant sample of any kind from the web, did you?

A I don't even know what it would mean to select a statistically significant sample of —

JUDGE BECKER: Have you had courses in statistics?

THE WITNESS: I have.

BY MS. BHATTACHARYYA:

Q You picked and chose the sites that went into your 500,000 site list, didn't you?

A I wouldn't say I picked and chose in the traditional way of choosing by hand. I chose, to begin with, the entirety of Yahoo!, for example.

Q And you eliminated from your list of sites that you ran through the filters those sites that were likely to be pornographic, isn't that true?

A I eliminated certain sites that I believed were likely to contain adult or sexually explicit content.

Q You eliminated all of the sites that Google categorizes adult, isn't that true?

A I did.

Q And you also received both general and specific direction from plaintiffs' counsel as to which sides to include on your list of 500,000, isn't that true?

A As to which sites to include in the 500,000, no, I suppose I didn't. I included all of Yahoo! and I don't know that counsel for the plaintiffs provided any particular guidance beyond that.

Q On page five of your report at the end of the first paragraph you state, "Counsel for the plaintiffs provided guidance both general and specific as to sites to be included and excluded from my testing."

Is that not a correct characterization?

A It's true that counsel for the plaintiffs provided general guidance as to sites to be included, and they provided both general and specific guidance as to sites to be excluded.

I can't recall any instance in which they provided specific guidance as to sites to be included, except for guidance that I should include the specific plaintiff sites, the names plaintiffs in this case.

JUDGE FULLAM: And that's fairly specific, isn't it?

BY MS. BHATTACHARYYA:

Q In fact, Mr. Edelman, you testified that with respect to Appendix A you reviewed all of the samples in that site, is that right?

JUDGE FULLAM: Yes, he said that several times.

BY MS. BHATTACHARYYA:

Q And Appendix A was assembled by counsel for the plaintiffs, isn't that true?

A Counsel for the plaintiffs selected the particular sites to be placed on Appendix A.

Q And Appendix A was the set-up sites that you then split into two pieces and farmed out to Dr. Ryan and Ms. Lipow to look at, is that right?

A It's correct that I sent the sites from Appendix A to Dr. Ryan and Ms. Lipow.

Q And those were the sites hand selected by plaintiffs' counsel?

A That's correct.

(Pause in proceedings.)

Q You also had plaintiffs' counsel review drafts of the sites listed in Appendix B, didn't you?

A I did.

Q And on occasion, plaintiffs' counsel advised you to remove certain sites from Appendix B, didn't they?

A They did.

Q And you also removed, as I think you testified, certain categories of sites based on the Yahoo! or Google characterizations from Appendix B, isn't that right?

A I did.

Q And plaintiffs' counsel provided you guidance with respect to which categories of sites to remove from Appendix B, isn't that true?

A They did.

Q You don't recall which categories you removed, isn't that fair?

A By and large, I do not.

Q And you don't recall how many sites you may have removed at the direction of plaintiffs' counsel, do you?

A I don't.

Q In fact, it would be fairly difficult to duplicate your procedure, wouldn't it?

A It would be difficult to perform the specific work I did in a way that yields this same list of 6,777 URLs certainly. I wouldn't expect that anyone else could do that, however, using my methods I would expect that someone else could produce a comparable list of similar sites of similar characteristics of over-blocking by and large.

Q You testified on direct that you used Google to generate sites related to the sites contained—that you extracted from Yahoo!.

Do you have any idea about how Google goes about generating those related sites?

A I do have some information about that.

Q But you don't have any specific information because most of that information is proprietary, isn't that fair?

JUDGE FULLAM: Is that a question. He just said he did, and you're accusing him—

MS. BHATTACHARYYA: I'm asking—

JUDGE FULLAM: —of not having it. Would you ask a question, please.

BY MS. BHATTACHARYYA:

Q Do you have specific information relating to the proprietary methods that Google uses to generate related sites using the What's Related feature?

A To the extent that the methods are proprietary, I of course couldn't have any information about their
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[P. Ex. 1]

[ALA Library Bill of Rights]

Library Bill of Rights

The American Library Association affirms that all libraries are forums for information and ideas, and that the following basic policies should guide their services.

I. Books and other library resources should be provided for the interest, information, and enlightenment of all people of the community the library serves. Materials should not be excluded because of the origin, background, or views of those contributing to their creation.

II. Libraries should provide materials and information presenting all points of view on current and historical issues. Materials should not be proscribed or removed because of partisan or doctrinal disapproval.

III. Libraries should challenge censorship in the fulfillment of their responsibility to provide information and enlightenment.

IV. Libraries should cooperate with all persons and groups concerned with resisting abridgment of free expression and free access to ideas.

V. A person's right to use a library should not be denied or abridged because of origin, age, background, or views.

VI. Libraries which make exhibit spaces and meeting rooms available to the public they serve should make such facilities available on an equitable basis, regardless of the beliefs or affiliations of individuals or groups requesting their use.

Adopted June 18, 1948. Amended February 2, 1961, and January 23, 1980, inclusion of "age" reaffirmed January 23, 1996, by the ALA Council.

[P. Ex. 4]

[ALA Statement on Library Use of Filtering]

STATEMENT ON LIBRARY USE OF FILTERING SOFTWARE

AMERICAN LIBRARY ASSOCIATION/INTELLECTUAL FREEDOM COMMITTEE

On June 26, 1997, the United States Supreme Court in *Reno, Attorney General of the United States, et al.* v. *American Civil Liberties Union, et al.*, issued a sweeping reaffirmation of core First Amendment principles and held that communications over the Internet deserve the highest level of Constitutional protection.

The Court's most fundamental holding was that communications on the Internet deserve the same level of Constitutional protection as books, magazines, newspapers, and speakers on a street corner soapbox. The Court found that the Internet "constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers," and that "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox."

For libraries, the most critical holding of the Supreme Court is that libraries that make content available on the Internet can continue to do so with the same Constitutional protections that apply to the books on libraries' shelves. The Court's conclusion that "the vast democratic fora of the Internet" merit full constitutional protection serves to protect libraries that provide their patrons with access to the Internet. The Court recognized the importance of enabling individuals to

receive speech from the entire world and to speak to the entire world. Libraries provide those opportunities to many who would not otherwise have them. The Supreme Court's decision protects that access.

The use in libraries of software filters to block constitutionally protected speech is inconsistent with the United States Constitution and federal law and may lead to legal exposure for the library and its governing authorities. The American Library Association affirms that the use of filtering software by libraries to block access to constitutionally protected speech violates the *Library Bill of Rights.*

WHAT IS BLOCKING/FILTERING SOFTWARE?

Blocking/filtering software is a mechanism used to:

- restrict access to Internet content, based on an internal database of the product, or;
- restrict access to Internet content through a database maintained external to the product itself, or;
- restrict access to Internet content to certain ratings assigned to those sites by a third party, or;
- restrict access to Internet content by scanning text, based on a keyword *or* phrase or text string, or;
- restrict access to Internet content by scanning pixels, based on color or tone, or;
- restrict access to Internet content based on the source of the information.

PROBLEMS WITH THE USE OF BLOCKING/FILTERING SOFTWARE IN LIBRARIES

- Publicly supported libraries are governmental institutions subject to the First Amendment, which forbids them from restricting information based on viewpoint or content discrimination.
- Libraries are places of inclusion rather than exclusion. Current blocking/filtering software not only prevents access to what some may consider "objectionable" material, but also blocks information protected by the First Amendment. The result is that legal and useful material will inevitably be blocked.
- Filters can impose the producer's viewpoint on the community.
- Producers do not generally reveal what is being blocked, or provide methods for users to reach sites that were inadvertently blocked.
- Criteria used to block content are vaguely defined and subjectively applied.
- The vast majority of Internet sites are informative and useful. Blocking/filtering software often blocks access to materials it is not designed to block.
- Most blocking/filtering software was designed for the home market and was intended to respond to the preferences of parents making decisions for their children. As these products have moved into the library market, they have created a dissonance with the basic mission of libraries. Libraries are responsible for serving a broad and diverse community with different preferences and

views. Blocking Internet sites is antithetical to library missions because it requires the library to limit information access.

- Filtering all Internet access is a one-size-fits-all "solution," which cannot adapt to the varying ages and maturity levels of individual users.
- A role of librarians is to advise and assist users in selecting information resources. Parents and only parents have the right and responsibility to restrict their own children's access—and only their own children's access—to library resources, including the Internet. Librarians do not serve *in loco parentis*.
- Library use of blocking/filtering software creates an implied contract with parents that their children ***will not*** be able to access material on the Internet that they do not wish their children to read or view. Libraries will be unable to fulfill this implied contract, due to the technological limitations of the software.
- Laws prohibiting the production or distribution of child pornography and obscenity apply to the Internet. These laws provide protection for libraries and their users.

WHAT CAN YOUR LIBRARY DO TO PROMOTE ACCESS TO THE INTERNET?

- Educate yourself, your staff, library board, governing bodies, community leaders, parents, elected officials, etc., about the Internet and how best to take advantage of the wealth of information available. Information on libraries and the Internet is available on the OIF Web site at www.ala.org/alaorg/oif/filtersandfiltering.html.

- Uphold the First Amendment by establishing and implementing written guidelines and policies on Internet use in your library in keeping with your library's overall policies on access to library materials. Information on Internet Use Policies is available on the OIF Web site at www.ala.org-/alaorg/oif/internetusepolicies.html. (See also "Internet Filtering Statements of State Library Associations" at www.ala.org/alaorg/oif/stateresolutions.html and Access to Electronic Information, Services, and Networks: An Interpretation of the Library Bill of Rights at www.ala.org-/alaorg/oif/electacc.html.)
- Promote Internet use by facilitating user access to Web sites that satisfy user interest and needs.
- Create and promote library Web pages designed both for general use and for use by children. These pages should point to sites that have been reviewed by library staff.
- Consider using privacy screens or arranging terminals away from public view to protect a user's confidentiality.
- Provide Internet information and training for parents and children on internet use which will include; the wide variety of useful resources on the internet, child safety on the Internet, limitations of filtering software and library rules regarding time, place and manner restriction.
- Establish and implement user behavior policies.

Intellectual Freedom Committee
July 1, 1997; Rev. November 17, 2000

For further information on this topic, contact the Office for Intellectual Freedom at 800/545-2433, ext. 4223, by fax at (312) 280-2447, or by e-mail at oif@ala.org.

[P. Ex. 9]

[ALA Freedom to Read Statement]

THE FREEDOM TO READ

The freedom to read is essential to our democracy. It is continuously under attack. Private groups and public authorities in various parts of the country are working to remove or limit access to reading materials, to censor content in schools, to label "controversial" views, to distribute lists of "objectionable" books or authors, and to purge libraries. These actions apparently rise from a view that our national tradition of free expression is no longer valid; that censorship and suppression are needed to avoid the subversion of politics and the corruption of morals. We, as citizens devoted to reading and as librarians and publishers responsible for disseminating ideas, wish to assert the public interest in the preservation of the freedom to read.

Most attempts at suppression rest on a denial of the fundamental premise of democracy: that the ordinary citizen, by exercising critical judgment, will accept the good and reject the bad. The censors, public and private, assume that they should determine what is good and what is bad for their fellow citizens.

We trust Americans to recognize propaganda and misinformation, and to make their own decisions about what they read and believe. We do not believe they need the help of censors to assist them in this task. We do not believe they are prepared to sacrifice their heritage of a free press in order to be "protected" against what others think may be bad for them. We believe they still favor free enterprise in ideas and expression.

These efforts at suppression are related to a larger pattern of pressures being brought against education, the press, art and images, films, broadcast media, and the Internet. The problem is not only one of actual censorship. The shadow of fear cast by these pressures leads, we suspect, to an even larger voluntary curtailment of expression by those who seek to avoid controversy.

Such pressure toward conformity is perhaps natural to a time of accelerated change. And yet suppression is never more dangerous than in such a time of social tension. Freedom has given the United States the elasticity to endure strain. Freedom keeps open the path of novel and creative solutions, and enables change to come by choice. Every silencing of a heresy, every enforcement of an orthodoxy, diminishes the toughness and resilience of our society and leaves it the less able to deal with controversy and difference.

Now as always in our history, reading is among our greatest freedoms. The freedom to read and write is almost the only means for making generally available ideas or manners of expression that can initially command only a small audience. The written word is the natural medium for the new idea and the untried voice from which come the original contributions to social growth. It is essential to the extended discussion that serious thought requires, and to the accumulation of knowledge and ideas into organized collections.

We believe that free communication is essential to the preservation of a free society and a creative culture. We believe that these pressures toward conformity present the danger of limiting the range and variety of inquiry and expression on which our democracy and our culture depend. We believe that every American community must jealously guard the freedom to publish and

to circulate, in order to preserve its own freedom to read. We believe that publishers and librarians have a profound responsibility to give validity to that freedom to read by making it possible for the readers to choose freely from a variety of offerings. The freedom to read is guaranteed by the Constitution. Those with faith in free people will stand firm on these constitutional guarantees of essential rights and will exercise the responsibilities that accompany these rights.

We therefore affirm these propositions:

1. *It is in the public interest for publishers and librarians to make available the widest diversity of views and expressions, including those that are unorthodox or unpopular with the majority.*

Creative thought is by definition new, and what is new is different. The bearer of every new thought is a rebel until that idea is refined and tested. Totalitarian systems attempt to maintain themselves in power by the ruthless suppression of any concept that challenges the established orthodoxy. The power of a democratic system to adapt to change is vastly strengthened by the freedom of its citizens to choose widely from among conflicting opinions offered freely to them. To stifle every nonconformist idea at birth would mark the end of the democratic process. Furthermore, only through the constant activity of weighing and selecting can the democratic mind attain the strength demanded by times like these. We need to know not only what we believe but why we believe it.

2. *Publishers, librarians, and booksellers do not need to endorse every idea or presentation they make available. It would conflict with the public interest for them to establish their own political, moral, or aesthetic views as a standard for determining what should be published or circulated.*

Publishers and librarians serve the educational process by helping to make available knowledge and ideas required for the growth of the mind and the increase of learning. They do not foster education by imposing as mentors the patterns of their own thought. The people should have the freedom to read and consider a broader range of ideas than those that may be held by any single librarian or publisher or government or church. It is wrong that what one can read should be confined to what another thinks proper.

3. *It is contrary to the public interest for publishers or librarians to bar access to writings on the basis of the personal history or political affiliations of the author.*

No art or literature can flourish if it is to be measured by the political views or private lives of its creators. No society of free people can flourish that draws up lists of writers to whom it will not listen, whatever they may have to say.

4. *There is no place in our society for efforts to coerce the taste of others, to confine adults to the reading matter deemed suitable for adolescents, or to inhibit the efforts of writers to achieve artistic expression.*

To some, much of modern expression is shocking. But is not much of life itself shocking? We cut off literature at the source if we prevent writers from dealing with the stuff of life. Parents and teachers have a responsi-

bility to prepare the young to meet the diversity of experiences in life to which they will be exposed, as they have a responsibility to help them learn to think critically for themselves. These are affirmative responsibilities, not to be discharged simply by preventing them from reading works for which they are not yet prepared. In these matters values differ, and values cannot be legislated; nor can machinery be devised that will suit the demands of one group without limiting the freedom of others.

5. *It is not in the public interest to force a reader to accept with any expression the prejudgment of a label characterizing it or its author as subversive or dangerous.*

The ideal of labeling presupposes the existence of individuals or groups with wisdom to determine by authority what is good or bad for the citizen. It presupposes that individuals must be directed in making up their minds about the ideas they examine. But Americans do not need others to do their thinking for them.

6. *It is the responsibility of publishers and librarians, as guardians of the people's freedom to read, to contest encroachments upon that freedom by individuals or groups seeking to impose their own standards or tastes upon the community at large.*

It is inevitable in the give and take of the democratic process that the political, the moral, or the aesthetic concepts of an individual or group will occasionally collide with those of another individual or group. In a free society individuals are free to determine for themselves what they wish to read, and each group is free to determine what it will recommend to its freely associated members. But no group has the right to take the law

into its own hands, and to impose its own concept of politics or morality upon other members of a democratic society. Freedom is no freedom if it is accorded only to the accepted and the inoffensive.

7. *It is the responsibility of publishers and librarians to give full meaning to the freedom to read by providing books that enrich the quality and diversity of thought and expression. By the exercise of this affirmative responsibility, they can demonstrate that the answer to a "bad" book is a good one, the answer to a "bad" idea is a good one.*

The freedom to read is of little consequence when the reader cannot obtain matter fit for that reader's purpose. What is needed is not only the absence of restraint, but the positive provision of opportunity for the people to read the best that has been thought and said. Books are the major channel by which the intellectual inheritance is handed down, and the principal means of its testing and growth. The defense of the freedom to read requires of all publishers and librarians the utmost of their faculties, and deserves of all citizens the fullest of their support.

We state these propositions neither lightly nor as easy generalizations. We here stake out a lofty claim for the value of the written word. We do so because we believe that it is possessed of enormous variety and usefulness, worthy of cherishing and keeping free. We realize that the application of these propositions may mean the dissemination of ideas and manners of expression that are repugnant to many persons. We do not state these propositions in the comfortable belief that what people read is unimportant. We believe rather that what people read is deeply important; that ideas can be dangerous; but that the suppression of ideas is fatal to a

democratic society. Freedom itself is a dangerous way of life, but it is ours.

This statement was originally issued in May of 1953 by the Westchester Conference of the American Library Association and the American Book Publishers Council, which in 1970 consolidated with the American Educational Publishers Institute to become the Association of American Publishers.

Adopted June 25, 1953; revised January 28, 1972, January 16, 1991, July 12, 2000, by the ALA Council and the AAP Freedom to Read Committee.

A Joint Statement by: American Library Association
Association of American Publishers

Subsequently Endorsed by:

American Association of University Professors
American Booksellers Foundation for Free Expression
American Society of Journalists and Authors
The American Society of Newspaper Editors
Anti-Defamation League of B'nai B'rith
Association of American University Presses
Center for Democracy & Technology
The Children's Book Council
The Electronic Frontier Foundation
Feminists for Free Expression
Freedom to Read Foundation
International Reading Association
The Media Institute
National Coalition Against Censorship
National PTA
Parents, Families and Friends of Lesbians and Gays
People for the American Way

Student Press Law Center
The Thomas Jefferson Center for the Protection of Free Expression

[P. Ex. 29]

[Libraries and the Internet Toolkit]

[Seal Omitted]

Libraries & the Internet Toolkit

Tips and guidance for managing and communicating about the Internet

www.ala.org/alaorg/oif/internettoolkit.html

Contributors:
American Library Association:
Office for Intellectual Freedom,
Public Information Office and
Washington Office

[Seal Omitted]

Libraries & the Internet Toolkit
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Permission is granted to libraries to reproduce this toolkit. Copies may be downloaded at **www.ala.org/alaorg/oif/internettoolkit.html.**

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Introduction

The Internet. No other medium in history has provided us with so much information so easily.

Where else can you get the latest news, "visit" a virtual museum, chat with friends in other countries and browse your favorite department store?

The Internet is a rich and educational resource for information, ideas and entertainment. But the Internet has also raised concerns about privacy and children's access to information. Libraries, especially public libraries, are facing these concerns every day. As the number one point of entry to the Internet outside of work, school or home, libraries are being challenged to provide online access to this extraordinary resource while facing scrutiny about their methods of protecting children from inappropriate material.

The American Library Association (ALA) encourages all libraries to implement policies that protect both children and public access to information and to take an active role in educating their communities about this important new resource. To support this effort, ALA has produced this "toolkit" with tips and guidance to assist librarians in managing the Internet and educating the public about how to use it effectively.

ALA also has published a brochure for parents called *The Librarian's Guide to Cyberspace for Parents and Kids* **(www.ala.org/parentspage/greatsites/guide.html)** with an introduction to the Internet, online safety tips and more than 50 of the best Web sites for kids. ALA's 700+ Great Sites for Kids and the People Who Care About Them **(www.ala.org/parentspage/greatsites/)** is an even more comprehensive resource of links to all

sorts of information, organized by topic and category by children's librarians.

What ALA Is for . . .

We are for libraries being partners with their respective communities to do the best job they can in providing resources to serve the needs of all of their patrons. When those needs within a community come into conflict with each other in a library setting, we are for a resolution that protects the First Amendment rights of all parties in conflict.

We are for the First Amendment rights of children to use libraries and we are for the rights of parents to decide with their children how their children use libraries.

We are for that dual advocacy role, but acknowledge that parents' rights in libraries do sometimes supersede the rights of their children. That is the role of the parent in our society—to care for, instruct, protect and monitor the behavior of their own children.

We are for parents taking an active role in carrying out those parental responsibilities in libraries, but not at the expense of other people's rights, or the rights of other people's children.

We are for protecting equitable access to the Internet for all, and providing the necessary education to make that access enriching and safe.

Key Messages Fast Facts

Key Messages

- The Internet is an important and exciting information resource. Our goal as librarians is to help people of all ages make the most of it and become information literate. We encourage everyone to go to the library and learn how to use this incredible and valuable resource!
- Librarians care deeply about children. We know filters aren't the best way or the only way to protect children online.
- The best protection for children is to teach them to use the Internet properly and to make good choices.
- Librarians answer questions and guide children to quality Web sites the same way they recommend books and other resources.

Fast Facts

- 95.7 percent of all public library outlets offer public access to the Internet.
- Public libraries offering Internet access have or are developing Internet use policies.
- For people without computers at home, work or school, libraries are the number one point of access to the Internet.
- Research has shown filters block at least one of five sites containing legal, useful information. They failed to block an average of 20 percent of material defined as undesirable.

Checklist for Creating an Internet Use Policy

The ALA strongly encourages all libraries to adopt and implement a written Internet use policy in the same way they adopt other library use and access policies. This policy should be in keeping with your library's mission statements, other access policies and community needs.

Traditionally, the children's and young adult sections contain materials selected for these groups, although children are not restricted to those areas. The same holds true for the Internet. For a discussion of the legal issues involved, see "Internet Filtering in Public Libraries," a memorandum from Jenner & Block at **www.ftrf.org/internetfilteringmemo.html.**

Here are a few suggestions to consider when creating or updating your policies:

- Ensure that policies speak to access for all.
- Involve your library staff, board and Friends group in the policy writing process.
- Keep it simple. Avoid jargon. Making the policy too technical will confuse people.
- Make policies readily available and visible to the public.
- Provide a code of conduct or etiquette guide for using the Internet at your library. Include specific suggestions for positive action. Also list prohibited behavior.
- Include a statement addressing patron privacy.
- Communicate clearly that users are responsible for what they access online; parents are responsible for their children's Internet use.

More tips and sample policies can be found at Internet Use Policies **(www.ala.org/alaorg/oif/internetusepolicies.html).**

Please send copies of your Internet use policy to the ALA Office for Intellectual Freedom, 50 East Huron Street, Chicago, IL, 60611, to keep on file. To receive samples of policies and materials from other libraries or

other intellectual freedom materials, contact the Office for Intellectual Freedom at 800-545-2433, ext. 4223, or send an e-mail to oif@ala.org. All of ALA's intellectual freedom policies and statements can be found on the OIF home page at **www.ala.org/alaorg/oif/.**

What You Can Do

Librarians can take many proactive measures to address concerns about children's Internet access. Be strategic. Be creative. Most of all, be prepared.

- Make sure your community is as knowledgeable about the Internet as possible. Instruct your staff, your library board and Friends about how the Internet works and what it offers. Encourage parents and children to take advantage of the wealth of information available online.
- Establish time limits on the use of computers, if necessary. Regardless of the method you choose—a sign-in sheet, an honor system or advance registration—always keep in mind the privacy of your users. You also may wish to create a daily limit for those users who like to "hop on and off" the computer. This reduces a potential monopoly by a handful of users.
- Link children's computers to pre-selected, recommended Web sites such as ALA's 700+ Great Sites. (Art for a button link can be found at **www.ssdesign.com/prtalkshop/art/index.html.)**
- Preset selected computers to search engines designed especially for children, such as KidsClick! **(http://sunsite.berkeley.edu/KidsClick!)** or Ask Jeeves for Kids **(www.ajkids.com).**

- Provide copies of *ALA's Librarian's Guide to Cyberspace for Parents & Kids* or other brochures with tips and resources to help parents guide their children's Internet use.
- Offer Internet classes for parents, children and others that focus on different aspects of the Internet, such as search engines, Internet safety or what makes a great Web site. Or put your classes online so the public has access to the material at their convenience. Make sure the classes include information about your Internet use policy, time limits on the computer and other pertinent instructions. Provide handouts.
- Recruit volunteers to teach Internet classes and assist users at their computer workstations. Make sure these volunteers are trained on your library's Internet use policy, privacy policy, and state and local confidentiality statutes.
- Create special displays of books and materials related to the Internet. Include information specifically geared for parents and children. Prepare a list of Internet-related resources (books, magazines, videos, reference materials) that people can take home with them.
- Encourage your users—including children—to recommend sites to your staff. You can ask them to vote on their favorite Web sites and print their top choices on flyers or bookmarks and distribute them.
- Include Internet resources in library displays. For example, highlight information available online in your display for Black History Month, Women's History Month, Banned Books Week, or your summer reading program.

- Consult "Checklist & Ideas for Library Staff Working with Community Leaders" at **www.ala.org/alaorg/oif/checklist.html** for a useful checklist of ideas for working with community residents.
- Develop Web sites for children and young adults that link to material especially recommended for them.
- Teach children how to use the Internet and to be critical users of information.
- Provide opportunities for parents and children to learn together. (For example, see familiesonlinetogether at **www.getnetwise.org/onlinetogether/.)**
- Use privacy screens or position terminals to prevent inadvertent or accidental viewing.
- Librarians across the country have taken steps to ensure that members of their communities have positive, safe experiences on the Internet. For a list of real life examples of how librarians successfully use the Internet every day, see Best Practices: How Librarians Are Managing the Internet at **www.ala.org/alaorg/oif/bestpractices.html.**

Educate! Inform! Promote!

Reach out to your community. Find creative ways to spread the word about library policies and programs to ensure a positive online experience.

- Seek opportunities to talk about your library's Internet use policy and computer/online resources. This may include speaking engagements with the PTA, your local school board, Rotary, Chamber of Commerce or other organizations. Provide hand-

outs such as *The Librarian's Guide to Cyberspace* brochure.

- Tie in Internet classes to "back-to-school" night, National Library Week, Teen Read Week or other promotions.
- Host an "open house" or other special demonstrations of your library's computer workstations and Web site to help users become more familiar with your online offerings.
- Create flyers or bookmarks with your library's Web address and computer training schedule. Make these available at the check-out desk and in locations outside the library. Work with schools to provide information to parents.
- Invite the mayor, state and federal legislators and other VIPs to tour the library and learn about your Internet policies and services. Provide a photo opportunity and encourage the newspaper to run the photo.
- Feature your Internet policy, classes and other online resources on your library's home page.
- Pitch feature or consumer stories to local media about what parents should know about the Internet and how librarians can help.

What Makes a Great Web Site for Children?

Make sure children and parents know what to look for in a Web site.

Several resources to help determine what's a good Web site for children can be found at Especially for Children and Their Parents (**www.ala.org/alaorg/oif/-children.html**). One such resource is from the

Multnomah County Library Homework Center—"Evaluating Web Sites: What Makes a Web Site Good?" (**www.multnomah.lib.or.us/lib/homework/webeval.-html**).

The Children and Technology Committee of the Association for Library Service to Children, a division of the ALA, suggests the following criteria for selecting quality Web sites for children:

- The purpose and content of the site are clear. A source is clearly identified. Contact information is provided.
- The content encourages exploration and thinking. It is appealing to, and suits the age level of, the children for whom it was designed.
- The site is easy to access. It loads quickly and essential information comes up first. Information is accurate and up to date.
- The site takes advantage of the Web's capabilities—it does more than can be done with print. It contributes something unique or unusual.

Current law requires commercial Web sites to verify parental permission before collecting personally identifiable information from children. For up-to-date information, visit the ALA Washington Office, Office of Information Technology Policy Web site, **www.ala.org/-oitp/privacy.html**. All great sites will include a privacy policy.

Tips for Parents

The following tips can be reproduced or edited for your library. Print them on flyers or bookmarks and

distribute during Internet training classes, back-to-school nights, library open houses and other events.

- Make time to learn about the Internet and how it works. Every computer with Internet access has search engines designed specifically for children that lead to sites selected especially for kids. It's important to become familiar with the Internet so you can use this medium with your children. Many schools and libraries offer classes that teach how to guide your children about the Internet.
- Set rules. Just as children are not allowed to play in the street, neither should they play unsupervised on the Internet. There are many common-sense tips that can ensure children have a positive experience online. For example, children should be taught not to give personal information, such as their names and addresses, to strangers online as well as off and not to agree to meet someone they met online without a parent or guardian present. Teach your children to value privacy-theirs and yours.
- Teach your children values and guidelines to use in selecting what they read and view. Not every Web site is right for every child, anymore than every book in the library is suitable for every person. It's up to you to let your children know what subjects and Web sites are off limits and to explain why. Parents should not let their children surf the Web alone unless they have set rules for them.
- Encourage your child to ask the librarian for help when seeking information on the Internet.
- Check out "Especially for Children and their Parents" at **www.ala.org/alaorg/oif/children.html**. This

page includes links to online safety rules and suggestions and great sites for parents and kids.

ALA and Filtering

The role of the ALA is to recommend policies that uphold one of the highest ideals of our profession and nation—the freedom to read and receive information as defined by our constitution and courts. Local libraries adopt their own policies to uphold this ideal and address the specific needs of their communities.

ALA does not recommend the use in libraries of filtering technology that blocks constitutionally protected information. Filters are known to block more than 20 percent of sites with legal information that library users may find helpful for school, work, health and other needs. Filters also do not fully protect children from objectionable material such as pornography, hate speech and violence.

Major purposes of libraries include empowering their users by providing them with the information they want or need, and helping people of all ages become information literate. To fulfill these missions, libraries must provide access to the broadest range of information. The Internet allows librarians to do this better than ever before.

ALA strongly encourages local libraries to adopt and implement Internet use policies that protect public access to information and promote a positive online experience. The ALA has prepared several documents to help local libraries develop policies and programs that address these concerns (see section on Helpful Resources).

ALA upholds the right and responsibility of parents to guide their children's library use, including their

Internet use. ALA encourages parents to learn about this important resource so they can guide their children and encourages local libraries to offer instruction for children and adults in how to use the Internet effectively.

ALA believes legislative attempts to mandate the use of filters are unnecessary, unwise and unconstitutional.

Children's Internet Protection Act (CIPA)

Congress passed the Children's Internet Protection Act (CIPA) and the Neighborhood Children's Internet Protection Act (NCIPA) as part of a major spending bill (H.R. 4577) on December 15, 2000. President Clinton signed the bill into law on December 21, 2000 (Public Law 106-554). The Acts place restrictions on the use of funding that is available through the Library Services and Technology Act, Title III of the Elementary and Secondary Education Act, and on the Universal Service discount program known as the E-rate. These restrictions take the form of requirements for Internet safety policies and technology which blocks or filters certain material from being accessed through the Internet.

ALA has filed a lawsuit to overturn CIPA, which ALA believes is unconstitutional. For people depending on the services libraries offer, ALA will fight to protect the rights of library users.

For the latest information and guidance about how the Acts affect libraries, what libraries need to do, and what ALA is doing to overturn CIPA, see the CIPA home page **at www.ala.org/cipa/**. The CIPA Web site is a joint effort of ALA's Office for Intellectual Freedom and Washington Office.

Debate over Filters

Public concerns about Internet access at the library should not be ignored. Many local libraries are experiencing increased pressure to limit Internet use by groups that believe filters are necessary to protect both children and adults from "undesirable" material. At the local, state and federal levels, legislation that would mandate the use of Internet filters in libraries has been introduced, and in some cases passed.

In order to prepare for dealing with such concerns, libraries should consider taking the following steps:

- Inform elected officials, your board members, Friends and library users of issues and concerns related to library Internet use. (See Checklist & Ideas for Library Staff Working with Community Leaders **(www.ala.org/alaorg/oif/checklist.html)**.
- Designate an official library spokesperson who is able to communicate the library's position in a caring and understandable way.
- Keep the lines of communication open. Listen to and acknowledge all concerns.
- Be prepared to demonstrate and document the policies and procedures your library has in place to address concerns. If your library has experienced problems with inappropriate Internet use, explain how you have dealt with it—in accordance with your Internet Use Policy.
- Make copies of ALA's *Libraries, the Internet and Filters* fact sheet or prepare your own fact sheet explaining what filters can and cannot do; pertinent legislation and court rulings; and other background.

- Be prepared to describe in layperson's terms the concerns librarians have about the limitations of filters, the false sense of protection filters may give and their impact on free access to materials that benefit library users.

If a local decision is made to use filters it's important to keep in mind the following:

- Consider providing a choice of filtered and unfiltered access to the Internet in keeping with court rulings that adults should not be limited to materials appropriate only for children and in recognition that the intellectual needs and maturity levels vary greatly from a six-year-old to an 18-year-old.
- Provide notice to library users when they are using a computer with filtered access to the Internet.
- Inform library users about which computers offer a filtering option in a way that does not infringe on their privacy or cause embarrassment. It should be clear to users when filters are on or off.
- Inform library users that their choice of sites or filtering options might not be confidential, depending on the system in place. Ideally, library computer technology should be programmed to maintain user confidentiality.
- Inform library users about the method in which they may request a site be unblocked for appropriate use.
- Be vigilant in monitoring developments in technology that best provide privacy, respect for First Amendment rights and freedom of choice for library users.

If your library is subject to a filtering mandate, the following are additional suggestions to consider:

- Inform yourself about the extent and details of the mandate. Know what choices your institution has within the mandate.
- Inform your library users about what restrictions are being placed on their Internet access and about what legal body is responsible for the restrictions.
- Document the impacts that the mandate has on your library and library services.
- Share the stories of how filtering impacts your library with library users, legislators, press and ALA.

Handling Tough Questions

The best way to deal with tough questions from library users, your board members, the mayor or a reporter is to be prepared. The following are a few tips to keep in mind:

- Listen—don't judge.
- Anticipate questions you might be asked and practice answering them.
- Acknowledge: "You obviously have strong feelings. I respect your views. Let me give you another perspective."
- Reframe the question—Why do you think students should be allowed to view pornography on the Internet? "You're asking me about our Internet policy...."
- Be honest. Tell the truth as you know it. "My experience with the Internet is...."

- Remember, it's not just what you say but how you say it. Speak simply, sincerely and with conviction.
- Less is more. Keep your answers short and to the point.
- Stick to your key message. Deliver it at least three times.
- Avoid use of negative/inflammatory words such as "pornography."
- Don't fudge. If you don't know the answer, say so.
- Never say "No comment." A simple "I'm sorry I can't answer that" is preferable.

Sample Answers to Tough Questions

Why do librarians allow kids to have access to pornography?

- We don't. Librarians care deeply about children. Libraries already have policies and programs to ensure children have an enriching and safe online experience. And librarians are there to help guide them. In our library, we find kids use the Internet the same way they use the library. They work on homework assignments, read about sports, music and other interests, and communicate with their friends.
- Librarians guide children to quality materials, whether in books or on Internet sites. We also provide classes to help teach children and parents about the Internet. In an information-rich society, librarians are information smart.

What are libraries doing about Internet porn?

- Librarians work with parents and community members to find solutions that work in their communities. We work closely with parents and others to find the best mix of solutions to ensure a safe, enriching experience—including children's areas with age appropriate books, tapes, records and Web sites.
- More than 95 percent of public libraries have Internet-use policies that were created with community input and local control. Libraries may: require library cards to use the Internet, require a signed agreement to be on file, monitor computer usage or locate Internet-access stations in highly trafficked areas, among other policies. A New Jersey public library requires parental choice of filtered or unfiltered computer access for children—and 80 to 90 percent of parents choose unfiltered.
- The Internet is good for kids. The Internet is changing how we live, learn, work and interact with one another. If today's children are to succeed, they must learn information literacy skills for ever-changing technologies.
- Few libraries report having difficulties with people looking at pornography. The vast majority of children and adults continue to use the library and the Internet responsibly and appropriately.

My neighbor told me she saw a group of teenage boys looking at nude pictures, and she had to walk by them with her four-year-old. Why would my library allow this?

- I'm sorry if your neighbor was uncomfortable. Libraries have policies that deal with disruptive be-

havior the same way they have other library policies. If the boys were causing a disturbance, this should be reported to the librarian. The fact is, the vast majority of children and adults use the Internet responsibly.

What can parents do to help protect their children?

- Education is the key. Parents don't need filters to protect their children online any more than they need a bodyguard to protect them in public. Filtering won't help kids understand there are certain people they shouldn't talk to on the Internet, and it won't teach them how to avoid negative sites.
- Parents should teach their children practical safety—that online or in public, the same rules apply: "Don't talk to strangers" and "Don't reveal information about yourself or your family just because you were asked for it." Most libraries offer Internet safety classes and tips online.
- We're concerned filters give parents a false sense of security that their children are protected when they aren't. Education is more effective than filters—kids need to make good decisions about what they read and view, no matter where they are.

What affect does the Internet have on children's privacy?

- The Internet provides children with increased opportunities to access information and resources. Children's safety depends on their being taught to be responsible for the protection of their own personal information. In libraries, librarians continue to assist children to find sound, credible materials, while helping them to understand the need to protect their privacy.

How do I know my child is safe at the library?

- Libraries are very safe, but they are open to everyone. Parents should accompany young children to the library and establish rules and expectations for older children. It's important to teach children how to make good decisions about what they read and view, no matter where they are.

My library uses privacy screens on its Internet terminals. Why has my library provided what amounts to private "peep show booths" for viewing Internet pornography?

- Your library has decided that privacy screens are the best way to ensure that its users have the privacy they need to research and study topics of interest to them, for instance, information on sensitive medical problems. Some users report being uncomfortable when they see other users viewing classical works of art or photographs of the Holocaust. Regardless, every library user has a right to privacy. While reading a book in the library, you don't expect a librarian or other user to be looking over your shoulder. When you are at an Internet terminal, you don't expect—or want—someone looking over your shoulder either. In the same way people have a right to access the information they want or need, they have a right to read or view that information in private.

What's wrong with filters anyway?

- Filters aren't effective. Filters were developed for home use, not for use in public institutions like libraries. Tests show filters block a lot of information many people find useful. At the same time, filters have been found to miss 20 percent or more of

sites with undesirable material. We're concerned that filters give parents a false sense of security that their children are protected when they aren't. Education is more effective than filters. No one has created a filter more effective than a librarian.

Don't some libraries already use filters?

- Some libraries offer some kind of filtering technology as part of their local Internet-use policy. About 15 percent of libraries use filters in some way—as an option on computers, or on some children's computers. A New Jersey library that offers one computer with filtered and one computer with unfiltered access to the Internet sends home permission slips for parents to choose what they prefer for their children. Between 80 and 90 percent of parents choose unfiltered access.

Isn't some protection better than none?

- Filters aren't the only way to protect children—or the best. Filtering technology won't help kids understand there are certain people they shouldn't talk to on the Internet, and it won't teach them how to avoid negative sites. The key is education. Many libraries offer classes for adults and children. They also have rules and policies promoting an enriching and safe online experience for everyone.

If libraries oppose filters so much, why don't they just give up the federal money? What's the big deal?

- The e-rate and LSTA programs specifically support improving access to technology in libraries. Forcing libraries to choose between funding for telecommunications services and new computer hardware and censoring access to such vital resources like medical or political information means library users

will lose—especially those in the most poverty-stricken and geographically isolated areas of the country.

- More than $190 million has been disbursed over three years with the federal e-rate program.
- The Library Services and Technology Act has distributed more than $782 million to libraries nationwide since 1998.

Won't computers and the Internet put libraries out of business?

- Not at all. In fact, if we didn't already have libraries, we would have to invent them because libraries have something very important the Internet doesn't—the librarian. The Internet is a wonderful resource and a great convenience, but it's far from perfect. Librarians have been collecting and organizing information for centuries. We can help you find the best source of information, whether it's online or in a book or pamphlet. Libraries also are places where people connect not just with books and computers, but with other people.

Why is the ALA forcing its policies on local libraries?

- The ALA's role is to recommend policies that promote the highest quality library and information services for the public. ALA respects the right of local libraries to adopt policies that uphold this ideal and meet the needs of their library users. Our association believes filters are not the best way to protect children.

Why should my tax dollars go to fund peep shows in the library?

- Your tax dollars support access to information. They buy picture books, encyclopedias, magazines, computers, and all the other materials available for you and your neighbors. They also provide access to the Internet—the most important new information technology of our time.

Libraries don't carry Hustler, why do they allow Internet porn?

- They don't. Nor do librarians monitor the books or periodicals people bring into the library. Just as people bring their own materials for reading and studying, the Internet empowers users to choose for themselves the information they wish to view. Librarians can help guide searches, but they do not control the rapidly changing information freely available via the Internet.

Kids can't rent R-rated movies at the video store, or buy Playboy at the newsstand. Why won't you use the same commonsense restrictions at my public library?

- Those types of rating systems are voluntary, and libraries make them available to assist parents and others in making decisions for their families and themselves. As librarians, we strongly encourage parents to take an active role in monitoring what their children see and view, but as public employees, it's not appropriate for librarians to make those decisions for them.

What are some examples of Web sites that have been filtered?

- One filter erroneously blocked the Web site of Republican Congressional candidate Jeffery Pollack for "full nudity," "partial nudity" and "sexual acts/ tests." Once favoring mandatory filtering, Pollack now opposes filtering and has since removed pro-filtering statements from his Web site. The sites of more than 30 candidates across the country were blocked in some manner, according to a November 2000 study conducted by peacefire.org.
- Other recorded examples have includ blocking of the Progressive Review, the FBI, eBay, NASA, Planned Parenthood, Beaver College, Superbowl XXX and the Mars Exploration, to name a few.

Why is the ALA suing against CIPA?

- The Children's Internet Protection Act (CIPA) doesn't protect children. Filters provide a false sense of security, suggesting children are protected when they are not. Meanwhile, CIPA limits access to legal, useful information for all library users.
- The American Library Association believes strongly that CIPA is unconstitutional. The filtering mandate imposed by Congress is unworkable in the context of a public institution because it restricts access to constitutionally protected speech on the users served by libraries. No filtering or blocking technology exists that blocks access only to speech that is obscene, child pornography or harmful to minors. And no filtering technology protects children from all objectionable materials.
- Filters are contrary to the mission of the public library, which is to provide access to the broadest

range of information for a community of diverse individuals. Filters have been shown to block access to medical information, political information and information related to the arts and literature.

Valuable Links

Selected publications available from ALA Editions
www.ala.org/alaorg/oif/selectdpubsala.html
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www.ala/org/alaorg/oif/selectedpubother.html

Quotable Quotes
www.ala.org/alaorg/oif/quotablequotes.html

Intellectual Freedom and Censorship Q & A
www.ala.org/alaorg/oif/
intellectualfreedomandcensorship.html

Libraries: An American Value
www.ala.org/alaorg/oif/lib_val.html

Statement of Commitment to Excellence in Library Service to Children in a Technological Age
www.ala.org/alsc/techstatement.html

Helpful Resources

ALA Office for Intellectual Freedom
www.ala.org/alaorg/oif/index.html
The Office for Intellectual Freedom provides a wealth of information regarding intellectual freedom and censorship, (including the forthcoming sixth edition of the Intellectual Freedom Manual,), sample library policies, the Library Bill of Rights and its Interpretations, intellectual freedom statements and more. Excellent resource for librarians dealing with Internet access is-

sues. Contact: ALA Office for Intellectual Freedom. Telephone: 800-545-2433, ext. 4223. Fax: 312-280-4227. E-mail: oif@ala.org

Children and the Internet: Guidelines for Developing Public Library Policy
www.ala.org/alsc/child_internet.html
Association for Library Trustees and Advocates, Association for Library Service to Children, Public Library Association, divisions of the ALA, 1998. Handbook designed for library trustees and others who are involved in setting public library policy and procedures. Sample Internet use policies and guidelines, resource lists and articles about intellectual freedom and censorship issues.

Coping with Challenges—Strategies and Tips for All Types of Libraries
www.ala.org/alaorg/oif/coping_inf.html
ALA, 1999, second edition. Tips and resources for developing and administering intellectual freedom policies, and communicating them to the public. Free. Contact: ALA Office for Intellectual Freedom. Telephone: 800-545-2433, ext. 4223. Fax: 312-280-4227. E-mail: oif@ala.org.

Filters and Filtering
http://www.ala.org/alaorg/oif/filtersandfiltering.html
The ALA Office for Intellectual Freedom offers links from its Web site to Internet use policies, court cases, pending legislation, intellectual freedom statements and more.

Guidelines and Considerations for Developing a Public Library Internet Use Policy
www.ala.org/alaorg/oif/internet.html

The Office for Intellectual Freedom wrote this guideline to assist libraries in writing an Internet use policy.

Intellectual Freedom for Children: The Censor is Coming
Association for Library Service to Children, 2000. This packet includes tips on how to deal with challenges and how to set selection policy. It also includes a chapter on filtering and the Internet. To order, call 800-545-2433, press 7.

Library Advocacy Now!
http://www.ala.org/pio/advocacy/
Training programs on how to be an effective spokesperson on library issues including children's access to the Internet. Little to no cost for local and state library groups of 25 or more. Contact: ALA Public Information Office. Telephone: 800-545-2433, ext. 5041/5044. Fax: 312-280-8520. Email: advocacy@ala.org.

The Nine Information Literacy Standards for Student Learning
www.ala.org/aasl/ip_nine.html
These standards, which anyone can use, outline the process for becoming information literate, defined as being able to access information efficiently and effectively, evaluate information critically and competently, and use information accurately and creatively.

PLA Tech Note: Filtering
www.pla.org/technotes/filtering.html
The Public Library Association provides questions and answers about filtering, information about Internet use policies and links to related resources, articles and court cases that address the issue of filtering in public libraries.

Online Resources for Parents and Children

700+ Amazing, Spectacular, Mysterious, Wonderful Web Sites for Kids and the Adults Who Care About Them
www.ala.org/parentspage/greatsites/
A cybercollection of links to Web sites for fun and learning. Recommended and organized by topic by children's librarians. Sponsored by the Association for Library Service to Children, a division of the ALA.

America Links Up
http://www.americalinksup.org
Tips and tools to help ensure children have a safe and rewarding online experience. Part of a parent education campaign launched in September 1998.

American Library Association/America Links Up @ the Library
http://www.ala.org/teach-in
Tips, suggestions and resources for sponsoring an Internet "teach-in."

Child Safety on the Information Superhighway
www.safekids.com/child_safety.htm
Larry Magid, a syndicated columnist for the *Los Angeles Times*, gives tips for becoming street smart on the Web. His "Guidelines for Parents" explains how to deal with everything from suggestive or misleading content to the danger of online-arranged meetings with strangers.

Especially for Children and Their Parents
www.ala.org/alaorg/oif/children.html
This page includes links to online safety rules and suggestions, designed-for-children search engines, all ALA

great sites, and other great sites for parents and kids. Also includes links to privacy pages.

FamiliesConnect
www.ala.org/ICONN/familiesconnect.html
Online classes from the American Association of School Librarians (AASL), a division of the ALA, designed to help parents and children learn to use the Internet together.

GetNetwise
www.getnetwise.org
An online service of companies and non-profit groups concerned about child safety on the Internet. The Web site provides a comprehensive "Web-wide" resource with safety tips, ways to report online trouble, tech tools for families, great Web sites for kids and a glossary of Internet terms.

ICONNnect
http://www.ala.org/ICONN/
Online classes for parents, librarians, teachers and others in how to use the Internet as an educational resource. Sponsored by the AASL.

KidsConnect
www.ala.org/ICONN/AskKC.html
An online question and answer service for students, operated by the American Association of School Librarians in partnership with the Information Institute of Syracuse University (N.Y.). The project is underwritten by Microsoft Corporation. Questions can be sent by e-mail to: AskKC@ala.org.Answers are promised within two school days.

The Librarian's Guide to Cyberspace for Parents & Kids
www.ala.org/parentspage/greatsites/guide.html
ALA's popular brochure with an introduction to the Internet for parents, safety tips, recommended Web sites and more. Free copies are available from the ALA Public Information Office while supplies last. You will be charged for shipping. Telephone: 800-545-2433. ext. 5044/5041. Fax: 312-944-8520. E-mail: pio@ala.org.

The Parents' Guide to the Information Superhighway
www.childrenspartnership.org/bbar/pbpg.html
Rules and tools for families online from The Children's Partnership. Comprehensive look at the information superhighway and what parents should know to help their children use it safely and wisely.

Parents' Guide to the Internet
http://www.ed.gov/pubs/parents/internet/
From the U.S. Department of Education, this guide suggests how parents can help their children tap into the wonders of the Internet while safeguarding them from potential hazards.

Privacy Resources for Librarians, Library Users, and Families
www.ala.org/alaorg/oif/privacyresources.html
This resource is intended to help librarians and all library users understand the issue of privacy and confidentiality.

Safety Tips for Kids on the Internet from the Federal Bureau of Investigation
http://www.fbi.gov/kids/crimepre/internet/internet.html
Site focuses on online safety and ways to report abuses.

A Safety Net for the Internet: A Parent's Guide
http://www.nypl.org/branch/safety.html
What parents should know about the Internet from the New York Public Library.

Teen Hoopla: An Internet Guide for Teens
www.ala.org/teenhoopla
Links to resources of special interest to teens. Subject areas include Arts and Entertainment, Books, Comics and Authors, Homework, Internet, Sports and more. The site is provided by the Young Adult Library Services Association, a division of ALA.

Fact Sheet: Libraries, the Internet and Filtering

In the race to wire America, one institution has led the way in ensuring that all people have access to this important new resource called the Internet: the library.

Congress recognized this essential role when it designated public libraries as universal service providers for online information in the Telecommunications Act of 1996. Since then, the number of public libraries online has tripled. Libraries are one of America's great democratic institutions, providing access to books and other resources to people of all ages and backgrounds regardless of their ability to pay. Today, libraries play a critical role in bridging the Digital Divide. Research shows that for people without Internet access at home, school or work, public libraries are the number one point of access (*Falling Through the Net*, NTIA 2000.).

The ALA acknowledges that there are laws pertaining to illegal materials and activity on the Internet that should be enforced. The ALA believes that the recently passed Children's Internet Protection Act is unconstitutional, and therefore is challenging the Act in

court. The association does not endorse the use of filtering technology in public libraries, because it is known to block legal material that library users may find useful for their jobs, studies, health and other needs.

The association strongly encourages local libraries to adopt policies and practices that govern Internet use in the same way they adopt other policies to ensure a positive library experience. The association also takes an active role in educating the public about how to use the Internet and encourages local libraries to play a leadership role in their communities. Almost all libraries offering Internet service have such policies and programs.

Fact: 95.7 percent of all public library outlets offer public Internet access. LARC Fact Sheet Number 26 (www.ala.org/library/fact26.html)

Fact: 95 percent of public libraries providing Internet access have formal Internet use policies. 2000 Survey of Internet Access Management in Public Libraries: Summary of Findings (www.lis.uiuc.edu/gslis/research/internet.pdf)

Fact: Evidence shows that the Internet is maintaining or extending family togetherness, helps create and strengthen friendships, and doesn't harm children's performance in school. "Contrary to popular belief, the Net doesn't alienate families. It brings them together." Christian Science Monitor, 10/26/00

Fact: Libraries report few complaints about Internet content from their users. A survey of approximately 1,000 public libraries found that while 50 percent of libraries had received informal

complaints about Internet access, only about 7 percent of these were content-related (although not necessarily focused on pornography). Most were about faulty equipment or a slow response time. Library Research Center of the University of Illinois at Urbana-Champaign, July 2000

Fact: The Supreme Court has ruled that communications on the Internet cannot be limited to what is suitable for children. *Reno v. ACLU*, March 1997

Fact: A federal district judge ruled that the use of filters on all computer terminals at the Loudoun County Library in Virginia was overly restrictive and violated the right of free speech guaranteed by the First Amendment. The library now has a policy that permits adults to choose computers with or without Internet filters. Parents must sign a statement declaring whether their children are allowed to use the Internet with or without filters. *Mainstream Loudoun v. Loudoun County Library*, November 23, 1998

Fact: A judge in Alameda County (Calif.) Superior Court dismissed a suit by a mother demanding that the Livermore Library install Internet filters after her 12-year-old son downloaded sexually explicit images onto a disk. A second suit filed by the mother was also dismissed. An appeals court has upheld the final dismissal of her lawsuit. *Kathleen R., et al. v. City of Livermore*, March 6, 2001

How filters work

Two basic types of filters for restricting access to Internet content currently dominate the commercial market: filters that block content containing disapproved words and filters that block access according to a compiled list of disapproved sites.

So-called "keyword" filters are most commonly used to screen e-mail and chat room messages by looking for listed "bad" words. Some filters can be set to reject the message or to forward it to a system administrator for review if a listed word is detected. Sometimes a message may be sent informing the sender that the message has been blocked.

Filters that block according to the originating site are most commonly used to restrict Web access. Currently, most commercial Web filters use "denial lists" of unapproved sites. The filter compares a Web browser request for a Web page to the denial list and, if the site is listed, prevents the browser from accessing the page.

Some of the more responsive products indicate the reason a site was included on a denial list, which allows the user to "tune" the filter by choosing the level and type of filtering desired. Although the recent political debate on filters has focused on pornography, denial lists are created with a much wider variety of considerations, including violence, hate speech, or even political ideas and values.

Each filter manufacturer, in its own way and according to its own standards, creates these lists. Both the list and the process by which it was compiled are typically considered by the manufacturer to be trade secrets. Those standards and processes—who decides,

how, and on what basis, a site should be included on the denial list—are not subject to outside scrutiny.

Denial lists are typically encoded in the distributed form of the programs and inaccessible to the average user. Manufacturers claim that, since most filters are relatively simple and straightforward programs, the denial lists are important competitive advantages for their products. When denial lists are inaccessible and difficult for users to modify, however, librarians cannot be sure what sites are being blocked, and they are prevented from providing patrons with access to information they may need.

Because the Web is growing so rapidly, the denial lists must also be updated frequently. New sites are added and sites are occasionally removed from denial lists in response to customer complaints. Similar to virus protection software, users are expected to download updated denial lists periodically from the manufacturers to keep the filter current.

Fact: The largest search engines are able to track only 10 to 18 percent of the Web sites accessible to the public.
Search Engine Showdown, October 2000

Fact: "Filtering software is no substitute for parental supervision. Most of the products we tested failed to block one objectionable site in five. America Online's Young Teen (or Kids Only) setting provides the best protection, though it will likely curb access to web sites addressing political and social issues."
"Digital Chaperones for Kids," *Consumer Reports*, March 2001

Fact: "In some cases, filters block harmless sites merely because their software does not consider the context in which a word or phrase is used."
"Digital Chaperones for Kids," *Consumer Reports*, March 2001

Fact: "According to a recent survey by Jupiter Research, seven out of ten parents handle the issue [of protecting children when they go online at home] by being present when their kids go online. Only 6 percent use stand-alone filtering software, products that promise to steer kids clear of undesirable material."
"Digital Chaperones for Kids," *Consumer Reports*, March 2001

Fact: "[S]chools, libraries, and other public access points continue to serve those groups that do not have access at home. For example, certain groups, such as the unemployed, Blacks, and Asian Americans and Pacific Islanders, are more likely to use public libraries to access the Internet."
NTIA. Falling Through the Net, Toward Digital Inclusion. (October 2000: Accessed: April 1, 2001) http://search.ntia.doc.gov/pdf/ fttn00.pdf)

Fact: "On Wednesday [March 28, 2001], *Chicago Tribune* columnist Clarence Page wrote a column criticizing blocking software . . . . Mr. Page's column was blocked by CYBERsitter as a result of the phrases he used in the text."
The Censorware Project

Fact: A survey discovered that many Web sites of Republican, Democratic, and other candidates

were blocked by two filtering software systems frequently used in schools.
Blind Ballots: Web Sites of U.S. Political Candidates Censored by Censorware, November 7, 2000

Fact: The conservative group Focus on the Family intends its site Pure Intimacy to be a "resource for those struggling with sexual temptations" and the "psychological bondage" that is "a major reason why individuals go online." One software filter blocked this site for violating the following categories: porno, hardcore porno, sexual, nudity.
Digital Freedom Network, "Foil the Filter Contest," September 28, 2000, http://dfn.org/Alerts/contest.htm

Fact: One software filter erroneously blocked the Web site of Republican Congressional candidate Jeffery Pollack for "full nudity," "partial nudity," and "sexual acts/tests." Once favoring filtering, he now opposes filtering and has since removed pro-filtering statements from his Web site.
"Filtering Programs Block Candidate Sites," Lisa M. Bowman, *ZDNet News*, November 8, 2000

Fact: "Filtering software-that Montgomery County, Maryland, officials had hoped to install by year's end in every public library to protect minors from inappropriate Internet content—failed to block nine out of ten adult-oriented Web sites in a recent test, according to the Alliance for

Better Library Services (ABLS), an independent citizen watchdog group."
"Filters fail to block adult sites." Clementina Pope, *The Gazette*, November 8, 2000

Fact: Government and the private sector undertake a major education and public awareness campaign targeted to families on the Internet that stresses the importance of involving caregivers in a child's online activity, the availability of both offline resources and one-click-away Internet technologies, and access to child friendly sites. Public libraries, community centers, schools and PTA's would be essential components of this effort.
Final Report of the Commission on Online Child Protection, October 2000

Role of the American Library Association

The mission of the American Library Association (ALA) is to promote the highest quality library and information services. This includes recommending model policies for local libraries to use in developing their own policies and procedures. ALA policies, such as the Library Bill of Rights adopted in 1940, are intended to protect the rights of library users to read and receive information as defined by the U.S. constitution and courts.

Fact: Local libraries are responsible for adopting their own operating policies and procedures.

Fact: The association does not endorse the use of filtering technology in public institutions, such as libraries, because it blocks legal information

that library users are entitled to under the Constitution;

Fact: The ALA has never endorsed the viewing of pornography by children or adults.

How librarians manage the Internet

Librarians have developed and continue to develop Internet management techniques with the goal of ensuring public access to information and a positive online experience for people of all ages. Some libraries (20 percent) use filters on some computer terminals, generally in children's areas.

Some libraries are experimenting with special library cards with computer chips that allow individual library users to control Internet access for themselves and their children. Unlike filters intended for use in the home, this technology can cost many thousands of dollars and must be integrated into other library computer systems. Other considerations for libraries are ease of maintenance, protecting library user privacy, respecting First Amendment rights and providing a choice for library users.

Frequently used strategies for managing the Internet include:

- Codes of conduct that define appropriate use of library computers and the Internet (e.g., no participation in illegal activities).
- Internet training classes for children and parents to teach them techniques, including how to search effectively, to ensure a positive online experience.
- Links to preselected sites such as the ALA's 700+ Great Sites for Kids (**www.ala.org/parentspage-**

/greatsites/amazing.html) and search engines specially designed for children such as KidsClick! (**http://sunsite.berkeley.edu/kidsclick!/**) or 'AOL's NetFind for Kids (**www.aol.com/netfind/kids/**).

- Privacy screens on workstations.
- Time limits and other rules for computer use in keeping with the library's mission statement and customer service practices.

Contact:
American Library Association
Public Information Office
312-280-5044/5041
pio@ala.org

Fact Sheet: Libraries, Children & the Internet

Why is the Internet important for children?
The Internet is changing how we live, learn, work and interact with one other. If today's children are to succeed as adults, they must learn information literacy skills for every resource—new and old.

What is the role of libraries?
Libraries provide access to the information people need or want, regardless of the format in which that information appears. The Internet is another medium through which libraries meet this mission. The latest figures show that about 95% of all public libraries, including branches, now provide Internet access to the public.

What are the roles of librarians?
Librarians are partners with parents. They are there to help their community—adults and children—become information literate by teaching them how to access, evaluate, and use information. They are there to an-

swer questions and guide children to quality Web sites in the same way they recommend books and other resources.

What is the role of the American Library Association?
ALA provides guidance for libraries in developing and implementing policies to ensure the highest quality library and information services. It also takes an active role in educating parents and the public about the Internet through its Web site (**www.ala.org**) and through participation in joint initiatives such as GetNetWise (**www.getnetwise.org/**).

ALA resources for parents and children include **Especially for Children and Their Parents, (www.ala.org/alaorg/oif/children.html) FamiliesConnect (www.ala/org/ICONN/familiesconnect.html)**, online classes for parents and children about how to use the Internet; **700+ Great Sites for Kids (www.ala.org/parent spage/greatsites), Teen Hoopla: An Internet Guide for Teens (www.ala.org/teenhoopla)**; and **The Librarian's Guide to Cyberspace for Parents & Kids (www.ala.org/parentspage/greatsites/guide.html)**. ALA also encourages local libraries to offer instruction for children and adults in how to use the Internet safely and effectively.

What is an Internet filter? How does it work?
Filtering or blocking technology restricts access to Internet content through a variety of means. Two basic types of filters currently dominate the market: filters that block content containing disapproved words (keyword blocking) and filters that block access according to a list of disapproved sites (site blocking). In either case, the filter manufacturer, in its own way and according to its own standards, determines which words or sites will be blocked.

What is the American Library Association's position on filtering?
The American Library Association (ALA) does not endorse using Internet filters in libraries, because they block access to information that is legal and useful. Filters are known to block a wide range of sites, including the FBI, eBay, Planned Parenthood, The Bible and others with information many people find helpful for school, work, health and other needs.

The ALA also is concerned that the use of filters may give parents a false sense their children are protected when this is not the case. Filters are not effective in blocking all "objectionable" material, and they do not protect against pedophiles and other interactive aspects of the Internet.

The ALA strongly believes that educating children to use the Internet wisely is their best protection, now and in the future.

For greater detail, see Filters and Filtering at **www.ala.org/alaorg/oif/filtersandfiltering.html** and Children's Internet Protection Act Web Site at **www.ala.org/cipa/.)**

What about the Children's Internet Protection Act, doesn't it require libraries filter?
Late last year, Congress passed the Children's Internet Protection Act (CIPA) and the Neighborhood Children's Internet Protection Act (NCIPA) as part of a major spending bill (H.R. 4577). These Acts require libraries receiving specific federal funds to adopt Internet safety policies and technology which blocks or filters certain material from being accessed through the Internet. The ALA believes these Acts are unconstitutional and has filed a lawsuit challenging them. For up-

to-date information, check the CIPA Web site **www.ala.org/cipa/.**

What type of guidance does ALA provide to libraries on this issue?
The ALA strongly encourages local libraries to adopt and implement Internet use policies in the same way they develop other policies based on the needs of their communities. Almost all have or are developing such policies.

Some policies require a guardian's signature to use the Internet. Some require parents to be present when children use the Internet. Some set time limits. Some revoke Internet privileges for viewing materials that are offensive to others. Some link computers in children's rooms only to pre-selected search engines or sites recommended for children. Some use filters. ALA strongly encourages local libraries to offer instruction for children and adults in how to use the Internet safely and effectively.

How many libraries have experienced problems with children viewing inappropriate material on the Internet?
Few libraries report difficulties with children viewing inappropriate material online. The vast majority of children and adults continue to use the library responsibly and appropriately.

What if a library decides to install filters? Would the ALA object?
ALA's role is to recommend policies that promote the highest quality library and information services for the American people. ALA respects the right of local libraries to adopt policies that uphold this ideal and meet

the needs of their library users. Our association believes filters are not the best way to protect children.

How can parents ensure their children have a positive online experience?
There are several things parents can do. The most important is to learn about the Internet and how it works. For example, every computer has access to child-friendly search engines such as KidsClick! (www.worldsofsearching.org), developed by the Ramapo Catskill (N.Y.) Library System. Many libraries, schools and community groups offer classes and materials to assist parents with what they need to know to guide their children.

Second, set rules. There are many common sense rules that can help ensure children have a positive experience online, such as not using their real names online and never agreeing to meet someone they meet online without a parent or guardian present.

Third, teach children how to use the resource properly and to make good decisions about what they view at the library or wherever they may be.

Fourth, introduce children to the librarian and encourage them to ask for help when seeking information on the Internet.

Fifth, teach children to value their privacy and that of those around them.

There are many excellent sources of advice for parents. These include the ALA's *Librarian's Guide to Cyberspace for Parents & Kids* **(www.ala.org/parent spage/greatsites/guide.html)** and Especially for Children and Their Parents **(www.ala.org/alaorg/ oif/children.html)**; *GetNetWise*, a comprehensive guide for parents **(www.**

getnetwise.org/); and *The Children's Partnership's Parent's Guide to the Information Superhighway* **(www.childrenspartnership.org).**

Are libraries without Internet filters safe for children?
Filters do not protect children, education does. The more children and parents know about the Internet and Internet safety, the better equipped they will be to protect themselves and enjoy their time online. Libraries have a long tradition of providing quality service to children and adults in a safe place, and they continue to do so. Parents and children should still exercise common sense in the library, like any public place.

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[P. Ex. 83]

[Expert Rebuttal Report of Mary K. Chelton]

Expert Witness Report by Mary K. Chelton, MLS, MPH, PHd

1. My name is Mary K. Chelton. I am an associate professor in the Graduate School of Library and Information Studies, Queens College, City University of New York. I received my doctorate from Rutgers University in 1997, completing a dissertation entitled *Adult-Adolescent Service Encounters: The Library Context.* Prior to joining the Queens College faculty, I was assistant professor at the School of Library and Information Management at Emporia State University in Kansas, and an Adjunct Professor at the Rutgers University School of Communication, Information and Library Studies and the Graduate School of Library Science at the University of Alabama. Before joining the academic library education community, I was a public librarian for thirty years.

2. I was a cofounder of *Voice of Youth Advocates*, a review journal for librarians serving adolescents in school and public libraries; the editor of three editions of *Excellence in Library Services for Young Adults* and the principal author of first editions of *Bare Bones Young Adult Services for Public Library Generalists*, and *Latchkey Children in the Public Library* for the American Library Association. I have published over fifty journal articles on library services and collections,

particularly about youth services and popular fiction genres. I was a consultant to the Office of Library Programs, U. S. Department of Education, for both of the national fast response surveys of public libraries about their services for children and young adults. While not exclusively, most of my professional positions have been in public libraries with responsibility for services for adolescents, collection development and staff development. In 1985 I was awarded the American Library Association's Grolier Foundation Award as a librarian whose "'unusual contribution' to the stimulation and guidance of reading by children and young people exemplifies outstanding achievement in the profession."

3. I have been engaged in collection development activities in all my public library positions. I have reviewed materials locally for system-wide order lists, and ordered materials for specific branch young adult collections in the Enoch Pratt Free Library and the Prince George's County Memorial Library in Maryland. In the Westchester Library System (NY), I ran an in-house reviewing system for materials for young adults for the 38 member libraries. In the Montgomery County Department of Public Libraries (MD), I coordinated the purchase of circulating adult and young adult materials for the 22 branches and bookmobiles of the system. While in that position, I also organized the Metropolitan Area Collection Development Consortium, consisting of the collection development coordinating staff of public libraries in the District of Columbia, Baltimore, and their

respective suburbs. My *Curriculum Vitae* is attached as Exhibit A.

4. I have been asked by Jenner & Block, attorneys for the ALA plaintiffs in this case, to respond to points made by the defendants' expert witnesses, specifically regarding the educational role of the public library and the contention that Internet software filters are no more than an electronic means of doing materials selection for public library collections.

5. I have not served as an expert witness during the last four years. I am being compensated at the rate of $110 per hour.

Defendants' Claims About the Educational Mission of the Public Library

6. The government's expert witnesses erroneously claim that the contemporary public library community is somehow homogeneous and unified in its commitment to a defined "educational" mission that mandates that exclusionary criteria be applied in developing collections so that only "quality" materials for self or civic improvement are selected. *See e.g.*, Expert Report of Donald G. David ¶ 10 ("Davis Report"). Contemporary public librarians attempt to create as broad a range of collections and services as possible that are responsive to local community demographics and interests which can be housed and afforded within limitations of space and budget. Except for some classics, standard reference works, and those items in high demand because of promotion in national media, such as the Oprah Winfrey's

television show or the *New York Times Book Review* bestseller list, which everyone collects, the only thing public libraries have in common is their variety.

7. One example of this variety occurs in a published reader in public librarianship that includes four essays under a section entitled "Public Library Purpose," only one of which covers educational objectives.[1] The others examine the public library as a center of culture, a social and entertainment center, and as a comprehensive community center. The Public Library Association, a division of the American Library Association, recognized this variety when it published and promoted a manual for planning and role-setting for public libraries in 1987. Fearing that many public libraries were stretching themselves too thin for available resources, the manual outlined for the libraries a process to plan with their communities to identify and formalize various roles already in existence on which they might concentrate. Four of the roles suggested were educational—"preschooler's door to learning," "formal educational support," "independent learning" and "research center," whereas others included "community information center" and "popular materials center."[2] A subsequent publication outlines various distinctive service responses public libraries can offer their communities, ranging from "basic literacy" to "local history and genealogy."[3]

8. The meaning of "education" has always been broader and less restricted, less elitist, more idiosyncratic and contested in public library practice

than suggested by the defendant's experts who have ignored that part of public library history. *See* Davis Report ¶¶ 5-11; Expert Report of Ronald G. McCabe ¶ 35 ("McCabe Report"). Even as early as the 1876 report of public libraries to the U. S. Bureau of Education, F. B. Perkins of the Boston Public Library said:

> The first mistake to be made in establishing a public library is choosing books of too thoughtful or solid a character. It is vain to go on the principle of collecting books that people ought to read, and afterwards trying to coax them to read them. The only practical method is to begin by supplying books that people already want to read, and afterwards to do whatever shall be found possible to elevate their reading tastes and habits. Most of those who read are young people who want entertainment and excitement, or tired people who want relaxation and amusement.[4]

This attitude that public libraries should not be so elitist in their collecting was reiterated later in *The Public Library Inquiry*.[5]

9. While public libraries *are* "educational" in the broadest sense of the term—meaning that materials and services are provided that are perceived to have use and meaning for the self-directed learning of library users, public libraries are *not* educational in the academic sense of a highly selective mandated curriculum. In fact, some critics have suggested that making a public library academic in its orientation will endanger its existence.[6] Dr. Davis himself intimates that

"education" is defined very broadly where he describes the "education" mission of the public library as expanding historically from the purpose of "civilizing" to providing "utilitarian" information to encompassing a "recreational function." Davis Report ¶¶ 8-9.

10. Public libraries promote self-directed voluntary education so users can find out and learn something they are interested in. Within these parameters, the widest possible array of materials is selected so people can decide for themselves what is appropriate. The problem with mandating filters is that this decision-making ability is removed, not only from adult patrons, from parents on behalf of their children, and from those young people who cannot talk with their parents, but also from the librarians on whom these patrons depend for suggestions. There are many people who cannot get those suggestions anywhere else.

11. The notion that because of the public library's educational mission, librarians seek to collect materials only of high quality and "educational value" regardless of demand, is not supported in actual practice. "Quality" has always been a contested concept for collection development because public librarians pay as much attention to demand as they do to quality, however it is defined, and the suggestion that demand and quality never intersect is specious. Patron request forms are ubiquitous in public libraries, and most automated public library online catalog systems have built into them the capability to determine and report the number-of-copies to number-of-

holds ratios for various titles, so extra copies of materials can be ordered when demand reaches a certain level. Demand is considered at least equal to any particular item's perceived quality in terms of selection criteria in public libraries, even in youth services departments. Demand is an expression of perceived value. For example, while everyone might agree that Philip Pullman's fantasy trilogy, universally acclaimed for literary quality, should be in every public library for users' edification, no one is excluding Harry Potter books in far larger numbers of copies just because Pullman's books are better. There is no one easy consensus on what might be considered "educational" for a public library's community.

12. Many of the arguments about "quality" in public library collections historically center around the presence of popular fiction, and whether the public library should serve "recreational," as well as educational, purposes. These arguments are far from settled, even now, though in practice, all public libraries provide popular literature. Until recently, with the publication of research about adult readers and on literacy acquisition by children,[7] popular fiction was publicly considered somewhat frivolous by many librarians, even at the same time that they were purchasing it.[8] One of the major aims of public library services to youth has been reading motivation, and one of the chief ways all librarians know to motivate young people to read is with popular fiction. Suggesting that public libraries exist only to provide quality materials with educational value, as opposed to

popular materials, is not an accurate portrait of contemporary or past public library practice.

13. The government's experts argue that because public library selection criteria exclude "pornography" from traditional library collections, there is no problem with excluding it from Internet access terminals in public libraries. Davis Report ¶ 36; Expert Report of Blaise Cronin¶ 6.2 ("Cronin Report"). This is duplicitous at best and rather simplistic. There is wide disagreement on what exactly is meant by "pornographic." Public libraries already collect a variety of explicit visual and textual materials on sexuality that fall within Constitutional protection even if their presence on public library shelves is politically controversial with some members of the library's community, and might be defined by some as "pornographic." Examples are Alex Comfort's books, *Joy of Sex* and *Joy of-Gay Sex*, Nicholson Baker's *Vox*, Robie Harris's *It's Perfectly Normal*, Judy Blume's *Forever*, Madonna's *Sex*, the Boston Women's Health Collective's *Our Bodies, Ourselves*, or Magic Johnson's *What You Can Do to Avoid AIDS*. None of these titles has been found to be legally obscene; yet there are people who deem them "pornographic" because of personal objections to explicitness or ideology.

14. Besides the fact that most websites on the Internet have not been subjected to legal scrutiny in a court of law, the issue for public librarians is that electronic filters cannot limit themselves *only* to illegal material.[9] Regardless of the limitations of electronic content filters for excluding access to

obscenity, though, the suggestion that whatever would not be purchased in other recorded formats (i. e. books, audiocassettes, films, DVDs, etc.), should also not be allowed into public libraries via the Internet, ignores the main reason that selection is done in the first place, which is to make the best use of scarce budget and space resources. Librarians select in an environment of scarcity. Few, if any, libraries have the financial resources or the shelf space to collect everything that would be or interest to their users. Librarians must therefore select the resources that would *best* meet their users' self-directed needs within the scope of their resources. On the World Wide Web such scarcity does not exist, and library users can have access to all the sites that meet their needs; however filters, by blocking sites, create an artificial scarcity. Since the Internet is so vast, it is ludicrous to equate it with the physical space limitations in even a large public library. Public librarians see the Internet as a way to eliminate the real scarcities they have coped with for years. The idea that filters should now manufacture virtual scarcity because of the limitations of real scarcity presents a false analogy as argument.

15. Public librarians have not demonstrated any reluctance to undertake responsibility for Internet resources within the library setting. While waiting for the results and possible applications of research library groups working on this problem,[10] they have simply followed a different model than the traditional select-or-deselect dichotomy it is suggested they use with material resources. It should be said that the old model was never

absolute inclusion or exclusion anyway; it was simply adjusted toward inclusion when demand was determined to be high enough, or perceived user literacy was low enough to factor it into selection criteria. The model that public librarians have used for Internet resources is closer to that used when providing readers advisory services—offering suggestions of Internet sites on their own websites and in-house terminals that users are free to visit or ignore.[11] Just a few examples include Pasadena (CA) Public Library's "Selected Internet Sites by Subject" (www.ci.pasadena.ca/us/library/subject-links.asp), Hennepin County (MN) Public Library's "eLibraries" (http://www.hennepin.lib.mn.us/pub/library_guide/elibraries/about_elibraries.html), Suffolk County (NY) Library System's "SuffolkWeb's Places for Kids & Teens" www.suffolk.lib.ny.us/youth/kids.html, Multnomah (OR) Public Library's "Homework Center—Homework Topics" www.multnomah.lib.or.us/lib/homework/, Atlanta Fulton (GA) Public Library's "Search the Internet" www.af.public.lib.ga.us/internet_links/index.html, County of Henrico (VA) Public Library's "Internet Tools" www.co.henrico.va.us/library/, Topeka Shawnee County (KS) Public Library's "Useful Links" www.tscpl.org/Library/tscplweblinks.htm, Norfolk (VA) Public Library's "Index to Websites www.npl.lib.va.us/sites/sites.html, and the Queens Borough Public Library (NY) "Internet Sites by Subject" www.queenslibrary.org/internet/index.asp.

16. Public librarians *must* integrate the Internet into their services for another reason—many reference

resources that used to be selected by public libraries in print formats are no longer available in print. These resources are moving to web formats and being licensed to public libraries who, in turn, provide access for their users off-site as well as in the library, with far more powerful searching capability than print ever allowed. Examples in the "Virtual Reference Collection" of the Suffolk County [Public] Libraries in New York include almanacs, dictionaries, directories, encyclopedias, government information, indexes, maps, newspapers, and compilations of statistics (vrc.suffolk.lib.ny.us/). Perhaps the question that should be raised is not whether public librarians are reluctant to select and deselect among Internet resources, but rather, whether electronic filters will deny access for public library users to Internet resources already selected by public librarians for them.

17. The Internet is not like an approval plan, as Dr. Davis suggests. Davis Report ¶ 32. First of all, approval plans are designed primarily by and for academic, not public, libraries, so that a supplier or publisher assumes the responsibility of automatically sending all materials that fit a library's profile specified in terms of subjects, levels, formats, prices, etc. The library has return privileges for anything it cannot use. The only kinds of preselection plans generally used in public libraries are review copies of juvenile materials to examine prior to purchase, primarily to look at the cover art of picture books, but these copies are sent usually at the largesse of individual publishers, not because the librarians have submitted

a profile based on their collection development criteria. The Internet does not send anything resembling a book to a library so it can be rejected before being purchased. Someone has to use a browser on a computer terminal to search for it. The Internet cannot be preconfigured according to a profile using filters because of the under or over breadth of what is excluded. If anything, providing Internet access in a public library is more analogous to providing users with an encyclopedia than an approval plan for staff.

18. Americans do understand that contemporary public library collections and services are intended to support their educational purposes, but they also want popular reading materials, as the reserve queues in any local public library, and the 51% of respondents on the 1994 pamphlet cited by Mr. McCabe, can document. *See* McCabe Report ¶ 10. In terms of "educational purposes," though, it is ironic that many of the very topics on which information is most frequently requested by secondary school students in public libraries for overt formal educational support for school papers would be unavailable to them with filtered Internet access. Some of these requests for information I am aware of include AIDS, sexually transmitted diseases, rainforest and environmental problems, capital punishment, free speech, legalization of drugs, tattooing and body piercing, abortion, the death penalty, teen suicide, eating disorders, racism/Ku Klux Klan, violence in schools and among teens, women in the military, gays in the military, gay marriage, gay adoption, Native Americans, astrology, dreams, witchcraft, organized crime/serial

killers, teen problems such as suicide, date rape, domestic violence, and eating disorders.[12]

Filters Are Not Just Another Form of Selection

19. The government's experts claim that filtering and selection are synonymous, *see* Cronin Report ¶¶ 4.1-4.6, but there is one profound difference between selection and filtering that they overlook—selection is intended to include content; filters are intended to exclude it. The fact that a librarian does not include something in a collection does not necessarily make the item bad. It may just be redundant. Filters exist to exclude content, the presumption being that whatever is excluded by the filter is bad. Selection presumes innocence. This distinction has been a bedrock of library collection development thinking since it was so clearly stated by Lester Asheim in 1953.[13]

20. Another distinction is about who is making the selection decisions. The review sources used by librarians have stated policies and reviewers are identified, usually other MLS graduates or subject specialists, such as those used in a source like *Science Books and Films* or *Software and CD-ROM Reviews On File*. The academic credentials and professional ethics of staff working on electronic filtering systems are generally unknown, and the criteria used difficult to determine except through the effects of the filter after the fact on what is blocked or accessed. Librarians also select materials that have not been reviewed if they determine enough user demand; whereas filters cannot automatically unblock something for

the same reason because they do not have the human ability to make the determination.

21. The defendants' experts contradict themselves. If public library selection decisions are made pursuant to specific policies and guidelines open to public and professional examination by human beings with knowledge of local communities using professional knowledge and judgment, as suggested by Dr. Davis, Davis Report ¶ 15, then filter blocking decisions are not the same thing, as Dr. Cronin claims, Cronin Report ¶¶ 4.1-4.6. Public librarians are not just human filters, because the selection process is not mechanical. Even taking the position that public library selection is biased only toward what is "worthy," to suggest that filters can evaluate "worthiness" and exclude only items that are not worthy is simply incorrect. Librarians do select materials by topic and subject matter, which filters can emulate somewhat, but they also select by treatment of the subject, orientation of the author, intended audience, knowledge of their specific service community, etc., none of which filters have the capacity to do.

22. While selection may still be an important role for public librarians in general, there are several trends in the field as it is currently practiced that offer competition for the primacy suggested by Dr. Davis. *See* Davis Report ¶¶ 16-17. The rise of centralized collection development units limits the number of public librarians performing this function within large public library systems such as those in the Baltimore-Washington area, and in Chicago. Collection maintenance, collection

promotion and the ongoing communication of user needs to the centralized department are more important so that relevant materials can be purchased efficiently while they are still available. Access to electronic and web-based resources is at least as important in reference services as selecting the resource in the first place, since increasingly, many reference sources can no longer be purchased for the collection in print formats. The organization of access is at least as important as selection decisions. Frontline working librarians' time in many public library systems is now primarily spent organizing public programs and providing reference services, with selection relegated to a small centralized staff.

23. Dr. Cronin claims that labeling already occurring in public libraries is no different from the labeling provided by filters. Cronin Report ¶¶ 4.3-4.5. Labeling of materials in public libraries and review media used by public libraries is done to maximize access to resources for users, not to keep them from finding things, which is the purpose of filters. Public librarians do label and categorize all the time, but they do it to help people find content, not to proscribe it. Genre labels for mysteries and location labels for picture books are never intended to prevent anyone of any age from finding the labeled material. Librarians do not label materials by keyword frequencies and word co-occurrences, which are the basis of most filter programs. Librarians do not label for content like the Motion Picture Association voluntary movie rating system, although they do make MPAA labels available as information to users on videos

in their collections that have been rated. Only one review journal, *Voice of Youth Advocates*, rates what is reviewed, and then only with a dual rating attached to each review indicating quality and popularity. (This is coincidentally the journal I helped establish). The assumption that filters are an aide to librarians in the categorization process is a fundamental misunderstanding of the purposes of labeling in public libraries, which is to create ease of access, not to block access. Mandated filters are not an extension, but rather a displacement, of librarian judgment.

24. Dr. Cronin suggest that outsourcing of all collection development to non-librarians is acceptable practice. Cronin Report ¶ 5.8. This is not considered acceptable practice in most public libraries, with the possible exception of opening day collections for new libraries, and for foreign language materials and cataloging, both of which are only outsourced within very strict guidelines for suppliers. Those suppliers, such as Brodart, usually have an MLS directing the project. The most notable instance of outsourcing of general selection to non librarians occurred in Hawaii's public libraries. It is generally considered an unmitigated disaster because librarians working directly with the public were not involved in determining the criteria sent to the vendor by the library system's management, and the resulting vendor choices not only did not take local interests and geography into account, but also ignored format preferences such as rack-sized paperbacks for young adult selections.[14] Regarding filters as just one more type of outsourcing without allowing

librarian access to and determination of the criteria by which material is filtered runs the risk of repeating the Hawaii debacle for public library use of the Internet.

25. Web-based resources can be subjected to the same criteria as print materials, which is exactly what public librarians are doing when they select websites to suggest for their users. To expect them to pick and choose among millions of websites, however, given the dynamic character of the Internet and the resources available to public libraries is totally unrealistic, when they can give those choices directly to the public with safeguards far less restrictive than those proposed by CIPA.

26. Although the same general guidelines are applicable, however, there are significant differences in practice between the management of digital resources and the management of print resources. The economic model of purchasing within a framework of scarce resources of space and money, with costly interlibrary loan as a backup, simply does not apply. If anything, the role of the public librarian becomes less that of limiting selector and more that of expansive information retriever. Being able to use the Internet for information retrieval is like having cheap interlibrary loan access available all the time. It also allows for information provision all the time, which the expense of keeping physical buildings open and staffed did not previously allow. Additionally, digital resources on the Internet, both licensed and free, allow public librarians to provide useful information for their users on topics they may previously

have had difficulty selecting, because time, money and space constraints did not allow them to do more than anticipate generalized needs rather than highly individualistic ones. Examples would include specialized information for hobbyists and collectors.

27. Contrary to the arguments of the defendants' experts, the goals of CIPA are not congruent with the historical assumptions underpinning the practice of public librarianship, because those assumptions as presented are biased. Public libraries do not impose materials within a limited notion of what they perceive to be good for people on a community to retain their funding. Local public libraries meet their users' needs or they are not supported. The assumptions presented not only ignore contemporary public library practice, but they also vastly underestimate the range of common values found in public library service communities across the country and the difficulty of determining them.

Signed:

/s/ MARY K. CHELTON
MARY K. CHELTON

Dated: November 29, 2001

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[Multnomah County Library Parents Guide]

Parent's Guide to Multnomah County Library

[IMAGE OMITTED]

All children have two wonderful resources for learning: their imagination and curiosity. Parents are always trying to answer their children's endless "How?" and "Why?" questions. Fortunately, libraries and librarians can help parents answer these unending questions, send kids on wondrous adventures, and provide them with the resources they need to learn and grow.

Welcome to Multnomah County Library! Here are answers to some questions you may have about libraries, along with suggestions for helping children become lifelong learners and library users.

What does Multnomah County Library offer my family?

Multnomah County Library offers much more than books. Visit for free entertainment and learning in the form of books, videos, music and live programs. You will find items for babies, toddlers, preschoolers, school-age children and teenagers.

Multnomah County libraries have:

- **special areas for children and teens with age-appropriate books and materials.**
- **a summer reading game, storytimes, book discussions, workshops and shows for young people. Programs such as these help kids learn**

to enjoy libraries and use them for information and entertainment.

- **computers that are reserved for children and loaded with educational games.** You may choose a filtered Internet search from any library computer with Internet access.
- **award-winning Web sites just for children and teens.** KidsPage has activities, booklists and links. Homework Center offers links to librarian-reviewed Web sites that specifically concentrate on K-12, homework-related subjects. Outernet is for teens. Visit www.multcolib.org.
- **resources for parents.** Check out books, magazines, videos, programs and Web pages especially of interest to parents. Booklists like "Babies Love Libraries" and "Books to Read Aloud" may help you discover items for your family.

How do librarians at Multnomah County Library work with children?

Multnomah County Library staff members are always happy to help you locate reading materials to suit your and your family members' interests, tastes and needs. Don't hesitate to ask for help. Librarians and library assistants are trained to help you locate specific books, books on a particular subject, or books for a particular age group.

In addition to answering your questions in person, librarians also create booklists and Web sites to guide your search for answers. Library employees lead storytimes for babies, toddlers and preschoolers, and they develop programs appropriate for the children in their communities. They visit neighborhood schools, and

they help teachers find materials and resources to enhance their lessons.

How do librarians at Multnomah County Library select books and other materials?

The majority of books and other materials selected have been reviewed and recommended by professional librarians or reviewers. Criteria may include popular demand, literary or artistic merit, and informational value. Purchases may also be made upon the recommendation of book discussion groups or upon a library user's request. Selection is an inclusive process, where librarians seek materials that will provide a broad range of viewpoints and subject matter.

Multnomah County Library provides books and other materials to meet the informational, educational, cultural and recreational needs of the people of Multnomah County. Multnomah County Library upholds the principles of intellectual freedom and the public's right to know by providing people of all ages with access and guidance to information, books and other materials that reflect many points of view. This means that, while the library has thousands of items families want, like and need, it also will have materials that some parents may find offensive to them or inappropriate for their children.

How can I help my child make the best use of the library?

Parents or legal guardians are responsible for deciding what books, other library materials, and level of Internet access are appropriate for their children or teenagers. Your participation in selecting and sharing books with your child is very important.

We encourage parents to help their children and teenagers select library resources in keeping with their family values. Multnomah County Library supports your right to choose books and other library materials for yourself and your family. We also support your right to choose a filtered Internet search by offering each user the ability to activate filtering software.

As the person responsible for your child, it's important for you to know that:

- All library materials are available to library users of any age.
- The library may contain books and other materials that some parents find inappropriate for their own children and teenagers.
- Young people mature at different rates, and readers' tastes, values and philosophies vary. **You know your children best and can best decide what library materials are appropriate for them.**
- The library respects the privacy of all library users, no matter their age. **We do not give out information about titles of books checked out, the number of books overdue, or the titles of books overdue, except to those who are able to provide the borrower's library card or library card number.**
- A library card allows a library user to access computer resources, the Internet. **We encourage parents to discuss with their children and teenagers the types of Internet searches that are in keeping with their family's values. Staff can provide instruction on activating blocking software on the library's computers. Children's computers will help guide your child to many kid-friendly sites.**

BEST AVAILABLE COPY

Parents and children are encouraged to read "Child Safety on the Information Highway," available free from any library location or on the library Web site (www.multcolib.org.).

Ten tips for families using the library

1. **Establish a family routine of going to the library on a regular basis.** Visiting the library with your children, once a week or once a month, encourages young people to use the library both for learning and pleasure and teaches them how to find what they need.
2. **Allow your kids to explore the library.** Children and teens are naturally attracted to materials intended for them. They are generally not attracted to materials that are too advanced for their reading or maturity levels. By asking questions and learning to find their own answers, young people learn to think for themselves, to compare and contrast differing opinions, and to analyze what they see and hear.
3. **Ask your librarian for suggestions about materials that are appropriate for your children's ages, maturity levels, knowledge and interests.** Read books and brochures that review materials for children or teens. Review this information yourself to determine if it is what you think your children may like or need. While librarians and resource lists can provide guidance, you know your children and family needs best.
4. **Discuss your family rules regarding library use with your children.** If you are concerned they will not respect your wishes, it is your

responsibility to visit the library with them or monitor their use of the library's remote services.

5. **You may decide to encourage your older children to visit the library alone.** When you can't go along, show an interest in what your children bring home from the library. Have a special shelf for library materials and take time to familiarize yourself with their borrowed items. Praise their independence and responsibility for caring for library materials and returning them on time.

6. **If you feel an item is inappropriate for your child, take the opportunity to express your views and provide guidance.** When you return the material, simply ask library staff to help you find something else from among the many choices available.

7. **Be aware that many young people seek information from libraries on very serious personal issues they may be embarrassed or afraid to discuss with an adult.** A factual library book, unlike hearsay from friends, can ease their fears or even keep them safe from harm. Remember that just because a child is reading or viewing something, it doesn't mean that he or she is participating or approves of it. If you have a concern, take this opportunity to discuss it with your child.

8. **Be a role model for library use.** While your child is browsing, look for books, magazines, music and movies for yourself! Nothing teaches children better than seeing you use and enjoy the wide range of materials available.

9. **Get to know your librarians.** Their expertise can help you and your children get the most out of the library.

10. **Ask for the item you want.** If the library doesn't already own it, library staff may be able to locate similar materials, borrow it from another library or purchase it.

For more information about how your library can meet your family's needs, talk to your librarian.

Multnomah County Library Home Page
www.multcolib.org

Multnomah County Library KidsPage
(for ages 14 and younger)
www.multcolib.org/kids/

Multnomah County Library Homework Center
www.multcolib.org/homework/

Multnomah County Library Outernet
(for ages 13-19)
www.multcolib.org/outer/

This brochure is available in accessible format upon request. Please call Independent Living Resources at 503.232.7411 (phone) or 503.232.8408 (TTY).

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[P. Ex. 104]

[Multnomah County Library Internet Use Policy]

A GUIDE TO MULTNOMAH COUNTY LIBRARY'S POLICIES REGARDING INTERNET USE

Multnomah County Library Acceptable Use of the Internet

ACCESS TO INTERNET RESOURCES

1.1 Multnomah County Library is committed to providing free and open access to informational, educational, recreational and cultural resources for library users of all ages and backgrounds. Throughout its history, the Multnomah County Library has made information available in a variety of formats, from print materials to audiovisual materials. The library's computer system provides the opportunity to integrate electronic resources from information networks around the world with the library's other resources.

1.2 The Internet, as an information resource, enables the library to provide information beyond the confines of its own collection. It allows access to ideas, information and commentary from around the globe. Currently, however, it is an unregulated medium. As such, while it offers access to a wealth of material that is personally, professionally, and culturally enriching to individuals of all ages, it also enables access to some material that may be offensive, disturbing and/or illegal, inaccurate or incomplete. Users are encouraged to be good information consumers by evaluating the validity of information accessed via the Internet.

1.3 In introducing the Internet as an information resource, the library's goal is to enhance its existing collection in size and depth and as a public access agency,

give opportunity to anyone who wishes to participate in navigating the Internet, both in the library and at home through dial-up service.

1.4 Library staff will identify specific starting points for searches on the library's home page that are appropriate to the library's mission and service roles. The library cannot control or monitor other material that may be accessible from Internet sources because the Internet is a vast and unregulated medium with access points that can and do change often, rapidly and unpredictably. Parents and children are encouraged to read "Child Safety on the Information Highway," available free from any library location.

IN-LIBRARY ACCESS

2.1 The library upholds and affirms the right of each individual to have access to constitutionally protected material. The library also affirms the right and responsibility of parents to determine and monitor their own children's use of library materials and resources.

2.2 Library staff is available to provide assistance and to help identify appropriate sites. The KidsPage, Outernet, Homework Center and Electronic Resources have been provided to assist users in finding age-and topic-appropriate sites. Parents and children are encouraged to read the pamphlet, "Child Safety on the Information Highway," available free from any library location. The user, however, is the selector in using the Internet and makes individual choices and decisions.

In order to make Internet resources available to as many users as possible and to ensure that this resource is used in a manner consistent with library policies, the following rules shall apply. Specific terms of use may vary by location.

CONDITIONS AND TERMS OF USE IN THE LIBRARY

3.1 Depending upon the demand placed on Internet resources at any particular library agency, users may have to sign up for a limited number of time slots per day. If this is required, users must sign up in person. Reservations will not be taken over the phone. Latecomers forfeit their time if more than 10 minutes late.

3.2 Misuse of the computer will result in the loss of computer privileges, potential loss of library privileges and possible prosecution. Such misuse includes, but is not limited to, using the computer for illegal activities; hacking into the library computer system or any other computer system; damaging or attempting to damage computer equipment or software; interfering with systems operations, integrity or security; gaining unauthorized access to another person's files; sending harassing messages to other computer users; altering or attempting to alter the library computer's settings; and violating copyright laws and software licensing agreements.

3.3 The library's computers are set up for optimal usage by a single individual. In some cases, such as a parent/guardian with children, it may be important for two or more people to work together at a computer. Otherwise, because of limited space, a maximum of two persons may sit/work together at any one computer.

3.4 All users are asked to respect the privacy of other users and not attempt to censor or comment upon what others are viewing.

11/00

Multnomah County Library

[P. Ex. 105]

MULTNOMAH COUNTY RFP 1.61

LIBRARY

[Seal Omitted]

[illegible] N.E. Russell Street, Portland, OR 97211-3796, Phone: (503)988-5402, Fax (503)988-5411

Ginnie Cooper, Director of Libraries

AA Memo 41/01
Posted

MEMORANDUM

TO: All Staff

FROM: Ruth Metz, Deputy Director

DATE: May 18, 2001

SUBJECT: INSTRUCTIONS TO STAFF CONCERNING RULES OF BEHAVIOR: CHILD PORNOGRAPHY AND RELATED QUESTIONS

Staff has posed the following questions related to patron conduct. These responses come after considerable review with the county attorney's office. Essentially, this is not new information to most staff. However, it is helpful to revisit these and related questions periodically, particularly with the advice of the county attorney.

Should you have questions or wish to discuss this information further, please contact me. If you wish me to meet with your unit to discuss these or related instructions, please contact me through your unit leader to make the arrangements.

1. Is viewing child pornography on a public search station illegal?

Answer: In theory yes. A prosecution may be brought under the state law, specifically ORS 163.684 to 163.687. ORS 163.684 to 163.687 provide for degrees of criminal liability for "encouraging child sexual abuse" by a person who knowingly "possesses or controls" a visual recording of sexually explicit conduct involving a child for the purpose of sexual arousal. The key is whether the person operating the computer to view the visual images could be found to be "in possession or control" of that image. To the extent it can be proved that a person had the requisite knowledge and was using it for sexual arousal, it is possible that person could be presecuted.

2. (a) Are Library employees subject to criminal prosecution under ORS 163.665-163.695 if a patron is found viewing child pornography on a Library computer?

2. (b) Are Library employees subject to criminal prosecution under ORS 167.065-167.095 if a patron is found to have used Library materials or resources, (i.e. computers or hard copy media) to furnish, send or exhibit obscene materials to minors or to otherwise disseminate obscene materials?

Answer to 2(a): No. ORS 163.665 to 163.695 establish criminal conduct for various activities relating to the possession, creation, use, dissemination and development of child pornography. The provision do not apply to Libraries except for ORS 163.670. ORS 163.670(1) provides:

> "A person commits the crime of using a child in a display of sexually explicit conduct if the person employs, authorizes, permits, compels or induces a child to participate or engage in sexually explicit conduct for any person to observe or to record in a photograph, motion picture, videotape or other visual recording."

It is illegal for a library employee to use a child in the *creation* of sexually explicit material. As the extent of patron activity in the Library would presumably be limited to downloading or viewing such material, this should not be an issue, with respect to the criminal liability of the Library or its employees.

Answer to 2(b): No. ORS 167.065-167.095 proscribe various activities with respect to the dissemination of obscene materials to minors and obscene materials generally. Like the child pornography statutes, there is also a general exemption to Libraries and Library employees acting within the scope of their employment, from prosecution under these status. See ORS 167.085 and ORS 167.089.

3. If a library staff person suspects that someone is viewing child pornography from a library computer search station, what should he/she do about it?

Answer: Keep in mind that library staff is not authorized to routinely, actively monitor what anyone is looking at on the public computers. Often, however, staff becomes aware of a particular situation because the image on the screen is in their line of vision or because someone else in the library has seen the screen, found it objectionable and brought it to staff's attention. Occasionally, the computer user has called on the staff person to assist him or her while the image is visable.

The advice of our legal counsel is that if staff sees a patron viewing what appears to be child pornography the staff person may call the police to explain the circumstances. It is then up to the police to decide whether further investigation by the police is warranted.

4. In instances when a patron reports suspected viewing of child pornography to a staff member, should the staff member make the phone call or should the reporting person be asked to make the call?

Answer: A patron who reports they have witnessed suspected viewing of child pornography on a library search station is welcome to call police on a library telephone if they choose to do so. It is also appropriate for the staff member receiving the report to make the call if the witness prefers not to do so. Under some circumstances, telling the reporting patron he must make the call may seem unresponsive.

The staff should treat a report of this nature, as with other incidents of inappropriate behavior, as an incident report. This would include obtaining the name of the contact number for the person reporting the incident. This enables police to follow up with the person or persons who witnessed the incident should the police decide to do so.

5. Should staff members try to identify the person who reportedly viewed child pornography or that he believes is viewing child pornography?

Answer: As in any incident, a physical description will be useful should the police ask for this once you have contacted them to discuss the incident.

6. If I know a library patron's name may I reveal the name to police when I am explaining the circumstances?

Answer: Yes. If you know the library patron's name you may use it in discussing the circumstances with police. Reporting the name alone does not breach confidentiality. However you should not release any other information about the patron from library records without prior authorization from the county attorney. This authorization would come by way of the library director's office. See the following question regarding law enforcement requests for patron information.

7. How should staff members respond to law enforcement requests for information contained in a library patron record?

Answer: Staff should advise the law enforcement official that library patron records are exempt from disclosure by library policy and by ORS 192.502(22).

The county attorney has advised us that all requests to disclose library patron records must be in the form of a subpoena. The county attorney will then determine the appropriate response to the subpoena.

8. What constitutes a "patron record"?

Answer: Multnomah County Library defines a patron record as that personal, identifying information we have in print or electronic form about a particular library user. Examples are address, phone number, social security number, birth date and other registration information. This includes any information that connects a particular patron to library resources or services he has used (e.g. circulation records, interlibrary loan requests, reference questions asked, materials used in house, use of electronic search stations, sign-up sheets for programs or classes, etc.)

9. What is the responsibility of staff with regard to a police request to "save" information (e.g. who was using a particular PC at a particular time, who had a particular book checked out, etc.) for a future subpoena or court order?

Answer: Once subpoena has been received we need to save the requested records(s) until the county attorney determines whether or not they must be released. Absent a subpoena we will treat all patron records in accordance with our usual retention schedule for those particular records.

10. What should we do if requested by a county parole officer to notify him when staff suspects sex offenders are looking at sexual content on our PCs?

Answer: Library rules do not authorize Library employees to monitor lawful activities of patrons on computers nor to discern when activities are legal or illegal. If staff sees a person known to be a registered sex offender viewing child pornography on a library computer, staff may report that activity to the police in the manner advised under question number 3 above.

11. What should library staff do when requested by parole officers to post information on public bulletin boards about a sexual predator in the neighborhood?

Answer: The branch manager or his designee determines this, in compliance with the Multnomah County Library's public bulletin board posting guidelines.

12. When is it appropriate to ask the police to investigate "suspicious behavior"? For example, branch staff has seen what they believe may be a sexual predator's grooming behavior towards young boys. They haven't seen anything overtly illegal but they see an adult male taking an unusual and frequent interest in a young boy who he's met at the library.

Answer: It may be appropriate to contact the police to explain the circumstances. This assumes the decision to do so has been reached after careful deliberation between the staff observer and a supervisor or the person-in-charge. It is appropriate to consider contacting the police when "suspicious behavior" causes concern for the immediate safety or security

of the library or anyone in it. The police will determine whether or not to investigate further.

13. When is it appropriate to ask the computer support staff to look from the computer room at what is being done on a particular PC? When might this be a breach of patron confidentiality and when is it a legitimate tool to use to investigate possible abuses of our own rules of behavior?

Answer: It is appropriate to alert the computer room staff to situations that could potentially compromise the security or functionality of the library's computer system. The bullets under # 12 of the search station policy, especially the 2nd through 8th relate to this.

Otherwise, it is not appropriate to ask the computer room staff to look at what is being done on a particular PC. Should situations arise when you are in doubt, make inquiry to the PIC, ASIST Supervisor (Lucien Kress), IT Manager (Lance Murty) or directors of Central Llibrary (Cindy Gibbon) or Community Services (Janet Kinney). Automation Services staff should direct requests or inquiries from staff to the ASIST supervisor or the IT Manager.

The statement in the search station policy about electronic monitoring is a disclosure to the public that we make on the advise of the county attorney. The fact that the library is capable of doing electronic monitoring doesn't mean we should.

Often, staff is looking for confirmation of what they are visually observing when they ask for a computer to be monitored by computer room staff. For example, if you suspect someone is viewing child pornography, it is not appropriate nor is it necessary to ask the computer room staff to electronically monitor the PC. Our rules of conduct and search station policies authorize staff to act on their good judgement. If in doubt, confer with a supervisor or PIC.

[P. Ex. 106]

[Multnomah County Library Behavior Rules]

Behavior in the Library

BEHAVIOR RULES GOVERNING THE USE OF MULTNOMAH COUNTY LIBRARY

The Multnomah County Library's Behavior Rules have a threefold purpose: to protect the rights and safety of library patrons, to protect the rights and safety of staff members, and to preserve and protect the library's materials, facilities and property.

Definitions and Scope

These Behavior Rules shall apply to all buildings, interior and exterior, and all grounds controlled and operated by the Multnomah County Library (such buildings and grounds are hereafter referred to as the "premises") and to all persons entering in or on the premises.

Listed below are the library's Behavior Rules. Persons who violate these rules may be ejected from the premises and excluded from all library premises for the period of time listed below.

Behavior Rules

Any person who violates rules 1-4 while in or on library premises will be immediately ejected and excluded from all Multnomah County Library premises without first being given a warning. Any person so excluded shall lose all library privileges for a period of up to three years, and the incident will be reported to the appropriate law enforcement agency.

1. Committing or attempting to commit any activity that would constitute a violation of any federal, state or local criminal statute or ordinance.
2. Engaging in sexual conduct, as defined under ORS 167.060, including, but not limited to, the physical manipulation or touching of a person's sex organs through a person's clothing in an act of apparent sexual stimulation or gratification.
3. Being under the influence of any controlled substance or intoxicating liquor. Controlled substance is defined in ORS 475.005.
4. Possessing, selling, distributing or consuming any alcoholic beverage, except as allowed at a library-approved event.

Any person who violates rules 5-17 while in or on library premises will be given up to one warning at the discretion of library staff; then the person will be asked to leave the premises for the day. Subsequent offenses by that person will result in that person's immediate ejection and exclusion from all Multnomah County Library premises. Any person so excluded shall lose all library privileges for a period of up to one year.

5. Engaging in conduct that disrupts or interferes with the normal operation of the library, or disturbs library staff or patrons, including, but not limited to, conduct that involves the use of abusive or threatening language or gestures, conduct that creates unreasonable noise, or conduct that consists of loud or boisterous physical behavior or talking.

6. Using library materials, equipment, furniture, fixtures or buildings in a manner inconsistent with the customary use thereof; or in a destructive, abusive or potentially damaging manner; or in a manner likely to cause personal injury to the actor or others.
7. Disobeying the reasonable direction of a library staff member or library security officer.
8. Soliciting, petitioning, distributing written materials or canvassing for political, charitable or religious purposes inside a library building, including the doorway or vestibule of any such library building or in a manner on the library premises that unreasonably interferes with or impedes access to the library.
9. Interfering with the free passage of library staff or patrons in or on the library premises, including, but not limited to, placing objects such as bicycles, skateboards, backpacks or other items in a manner that interferes with free passage.
10. Placing personal belongings on or against buildings, furniture, equipment or fixtures in a manner that interferes with library staff or patron use of the library facility.
11. Bringing bicycles or other similar devices inside library buildings, including, but not limited to, vestibules or covered doorways if no bicycle rack is provided within that area.
12. Operating roller skates, skateboards or other similar devices in or on library premises.
13. Parking vehicles on library premises for purposes other than library use. Vehicles parked in violation of this rule may be towed at the owner's expense.

14. Smoking or other use of tobacco.
15. Eating and drinking inside library buildings, except as allowed at a library-approved event. Drinking water at a library-provided water fountain is not a violation of this rule. At Central Library, items purchased at the library coffee bar may be consumed in the Popular Library section only.
16. Bringing animals inside library buildings (with the exception of service animals), except as allowed at a library-approved event.
17. Violating the library's Computer Search Station Policy, which is posted at every search station table.

Any person who violates rules 18-21 while in or on library premises will be given up to two warnings at the discretion of library staff; then the person will be asked to leave the premises for the day. Subsequent offenses by that person will result in that person's immediate ejection and exclusion from all Multnomah County Library premises. Any person so excluded shall lose all library privileges for a period of up to six months.

18. Sleeping in or on library premises.
19. Improperly using library restrooms, including, but not limited to, bathing, shaving, washing hair and changing clothes.
20. Using personal electronic equipment at a volume that disturbs others, including, but not limited to,

pagers, stereos, televisions and cellular telephones.

21. Leaving one or more children under the age of 6, who reasonably appear to be unsupervised or unattended, anywhere in or on library premises.

Any person who violates rules 22 and 23 while in or on library premises will be excluded from the premises until the problem is corrected:

22. Entering library buildings with bare feet or a bare chest.
23. Disturbing others because of offensive body odor.

Please feel free to send comments and suggestions.

The address for this site is: http://www.multcolib.org/about/pol-use.html

Last updated: Friday, June 30, 2000

[P. Ex. 109]
[Expert Report of Joseph Janes (without attachments)]

EXPERT REPORT OF JOSEPH JANES

I. Background

As a library educator with expertise in networked information systems such as the Internet, I have been asked to provide expert testimony in this case. I have previously provided expert testimony in one case, *Mainstream Loudoun et al.* v. *Board of Trustees of the Loudoun County Library*. I am providing my services in this case for free. Some of the exhibits that are attached to this report may be introduced during my testimony. At this time, I do not anticipate using any additional exhibits.

I hold three degrees, all from Syracuse University: an A.B. in Mathematics with a dual major in Information and Library Studies, a Masters in Library Science, and a Ph.D. in Information Transfer. A copy of my curriculum vitae is attached as Exhibit 1. I am currently Assistant Professor in the Information School of the University of Washington. I have been teaching at the graduate level since 1984 in library schools at Syracuse, the University of North Carolina, the State University of New York at Albany, and the Universities of Michigan and Washington. I have taught introductory courses in the areas of online search and retrieval, the use of technologies in library work, statistics and research methods, and reference. I have taught advanced courses or seminars in most of these areas, as well as the development of Internet-based library applications and services, the impacts of technology, and relevance research.

I was also the founder and Director of the Internet Public Library, an online library available to the public at http://www.ipl.org. In addition, in the last several years, I have consulted with the New York Public Library in the building of their new Science, Industry and Business Library, with the Henry Ford Museum in Dearborn, Michigan on Internet applications there and with the Multnomah County Library in Oregon on new reference initiatives. I was a co-founder, with Louis Rosenfeld, of Argus Associates, Inc., an Internet consulting and information architecture firm. I have given presentations, including keynote addresses, at major conferences in the United States, Canada, Great Britain, and Japan, the Netherlands, and have been interviewed on technology/library issues on National Public Radio and the BBC.

My creative and research interests include investigating ways in which the emerging information environment is affecting the practice of librarianship, and how the principles of librarianship can best be used to make this environment easier to use. This includes:

- questions about the use of networked information resources (such as those found on the Internet) to answer ready-reference and more detailed research questions,
- development of network-based services and systems which take advantage of concepts and practices from librarianship,
- thinking about ways in which librarianship can and should evolve to adapt to and take advantage of high-speed computing, high-bandwidth communication and mass interconnection.

I will be providing expert testimony in this case about the degree to which blocking software is blocking access to Internet sites that would be of use or interest in a library context.

II. Methodology

In September of 2001, I received a request from Christopher Hansen of the American Civil Liberties Union to file an expert report in this case to evaluate whether a sites that had been blocked by various Internet blocking software packages were examples of "overblocking", that is, were blocked but would be of use, value or interest in a library collection or context. I agreed to participate, and we discussed the nature of the work to be done, including drawing a random sample of those sites and evaluating them individually.

On September 21, 2001, I received a file via electronic from Ben Edelman. That file contained a list of 6775 addresses of Web sites. To provide a high degree of confidence in the results, I chose to draw a sample of 859 of those sites. Sampling theory dictates that a sample of that size would produce a 95% confidence interval of ±2.5% around my estimate of the proportion of sites that were overblocked; that is, in 19 of 20 cases, the true proportion of overblocked sites in the population of 6775 would lie within 2.5% of the proportion found in the sample of 859. See Exhibit 2.[1]

I downloaded the list into SPSS, a popular and frequently used statistical software package. In addition to the list of sites, the file included categories under which three of the blocking software packages had blocked each site. I performed simple frequency analyses on the list to determine the proportions of sites blocked by each package in each category. For

example, the N2H2 package blocked 915 of the 6775 sites as "Sex", about 13.5% of the total list.

I used SPSS to draw a simple random sample of 859 of the sites. After drawing a potential sample, I calculated the frequencies of each category for the sample and compared them to that of the population, trying to get a sample that closely mirrored the population in as many ways as possible. In the sample, 14.3% of the sites were blocked by N2H2 as "Pornography", and in each case, the sample and population proportions differed by no more than 1%.

To assist in the evaluation of this sample, I recruited, via electronic mail, a number of current and former students at the Information School of the University of Washington. I asked for people with experience, coursework, or background in collection development. A total of 16 people responded and were able to assist; I divided this group into two parts. Those with less direct experience (a group of 11) would evaluate the entire list to identify the most obviously overblocked sites; the second group, those with much more experience in school or public library collection development and reference work, would review the remaining sites to make final decisions.

In the first round, each person evaluated two groups of about 80 sites, and each group of sites was evaluated by two different people. Each group of sites included the following instructions:

> Look carefully at each of the Web sites on the list. Please make a notation of any site that appears to meet **any** of the following criteria:
>
> a. Contains information similar to that already found in libraries,

> **or**
>
> b. Contains information a librarian would want in the library if s/he had unlimited funds to purchase information and unlimited shelf space,
>
> **or**
>
> c. You would be willing to refer a patron (of any age) to the site if the patron appeared at a reference desk seeking information about the subject of the site. For this last criterion, we recognize that you might not refer a young child to a Calculus site just because it would not be useful to that child, but you should ignore that factor. Informational sites, such as a Calculus site should be noted. A site that is purely erotica should not be noted.
>
> Enter "Yes" in the right-hand column for any site that meets **any** of the above criteria, in your judgment. Enter "No" for any site that meets **none** of these criteria.

The final sentence in c) above was intended to indicate that erotica sites should be voted "No"; this point was clarified for second-round judges.

Sites that received "Yes" votes from both judges were determined to be of sufficient interest in a library context and removed from further analysis. Sites receiving one or two "No" votes would go to the next round. Requiring two "Yes" votes at this stage is a high standard and raises confidence in these judgments. All judges worked independently and were instructed not to discuss their work with anyone else until all decisions had been made.

One participant in this round was unable to complete his assignment. I decided to exclude the two groups of

sites he was to evaluate from further analysis. Since groups of sites were randomly assigned to judges, and the sites were ordered alphabetically, it is unlikely that these two groups of sites differed significantly from the rest of the sample. Excluding these sites leaves a sample size of 699, and this widens the confidence interval for results to ±2.8%. Analysis of the blocking categories of the 160 omitted sites reveals slightly higher proportions for some categories, and slightly lower proportions for others (the N2H2 "Sex" category was 11.3% of these sites), so they do not appear to be significantly different from the sample or population.

III. Results

In the first round of analysis, 243 sites (34.8% of the sample) received "Yes" votes from both judges (See Exhibit 3); 456 sites (65.2%) received one or more "No" votes or could not be found and were therefore sent forward to the second round of judging. See Exhibit 4.

Some of the judges in the first round had difficulty in deciding what to do with sites that seemed to have a primarily commercial purpose and in most cases voted them as "No". For the second round of judging, we added a sentence to the judges' instructions; since most libraries include in their collections the Yellow Pages and other guides or directories of commercial enterprises, and since one could easily imagine people wishing to do research on, say, the ways in which people are selling products or services or otherwise conducting business on the Internet, we instructed judges to vote "Yes" on such sites. The new instructions read:

> Look carefully at each of the Web sites on the list. Please make a notation of any site that appears to meet **any** of the following criteria:

> a. Contains information similar to that already found in libraries,
>
> **or**
>
> b. Contains information a librarian would want in the library if s/he had unlimited funds to purchase information and unlimited shelf space,
>
> **or**
>
> c. You would be willing to refer a patron (of any age) to the site if the patron appeared at a reference desk seeking information about the subject of the site. For this last criterion, we recognize that you might not refer a young child to a Calculus site just because it would not be useful to that child, but you should ignore that factor. Informational sites, such as a Calculus site should be noted. Sites that have a commercial purpose should be included here if they might be of use or interest to someone wishing to buy the product or service or doing research on commercial behavior on the Internet, much as most libraries include the Yellow Pages in their collections. A site that is purely erotica should not be noted.
>
> Enter "Yes" in the right-hand column for any site that meets **any** of the above criteria, in your judgment. Enter "No" for any site that meets **none** of these criteria

This second round of judging produced the following results: 60 sites could not be found (due to broken links, 404 not found errors, domain for sale messages, etc.), 231 sites were judged "Yes", and 165 judged "No". (One site, http://www.WFTurfClub.com, was inadver-

tently not evaluated by the judge; I looked at it and judged it "Yes".) See Exhibit 5.

Second-round judges had substantially more experience in library reference and collection development work, and so I felt it reasonable to rely on their judgments.

IV. Conclusions

Overall, then, 165 of the 699 sites evaluated were found not to be of any value or use in a library context, 23.6% of the total. 60, or 8.6% could not be found, and therefore 474 of the sites, or 67.8% are examples of overblocking on the part of these blocking packages. We then can be 95% confident that the actual proportion of overblocked sites in the population of 6775 sites is between 65.0% and 70.6%.

Based on this analysis, I conclude that the blocking programs tested block a significant amount of content that would be appropriate in a library setting.

Dated: October 15, 2001

Signed_____
Joseph Janes

[P. Ex. 110-119]

Exhibits 110-119 are web page screen shots that have been omitted and will be submitted in a separate lodging.

[P. Ex. 122-123]

Exhibits 122-123 are CD-ROMs that have been omitted and will be submitted in a separate lodging.

[P. Ex. 128-135, 162 A-K, 165-169]

Exhibits 128-135, 162 A-K, and 165-169 are web page screen shots that have been omitted and will be submitted in a separate lodging.

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No. 02-361

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

AMERICAN LIBRARY ASSOCIATION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOINT APPENDIX
(VOLUME 3)

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[D. Ex. 8]

DANGEROUS ACCESS, 2000 EDITION:

Uncovering Internet Pornography in America's Libraries

[SEAL]

David Burt, Author

Dangerous Access, 2000 Edition:
Uncovering Internet Pornography in America's Libraries
By David Burt
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FOREWORD

by
Janet M. LaRue, Esq.
Senior Director of Legal Studies
Family Research Council

The author, David Burt, is a public librarian in Lake Oswego, Oregon, a loving husband, father, and good friend. Despite his full life and schedule, he has become a tireless and effective activist working to keep America's libraries safe for children and adults and free from the destructive presence of illegal pornography and sexual predators.

As a librarian, David knows and supports the mission and purpose of a public library, best expressed in the mission statement of the Los Angeles Public Library: "The Los Angeles Public Library strives to inform, enrich, and empower every individual in its community by creating and promoting free and easy access to a vast array of ideas and information and by supporting lifelong learning in a welcoming environment." No one could imagine that such a noble purpose was meant to include a pedophile operating a child pornography website and soliciting sexual liaisons with children in that very library.

Aware that pornography is becoming a staple in one library after another because adults and children are accessing it through unfiltered library computer terminals, David could no longer reconcile the mission of

public libraries with what was happening. Equally distressing to him was the absolute refusal of the American Library Association (ALA) to admit a problem existed or to exercise its enormous political and financial clout to keep America's libraries from becoming virtual dirty bookstores open to children and funded by taxpayers. Thankfully, a growing number of public librarians and officials have recognized the magnitude of the problem and are acting to stop it, despite the resistance of the ALA.

David's activism has exponentially increased since he created his website, *www.filteringfacts.org*, where he continues to gather, archive, and disseminate information as well as provide assistance to those who share his concerns and efforts to stop the misuse and perversion of public libraries.

While 74 percent of public libraries provide some access to the Internet and related services through interactive computer services, only 15 percent of those libraries utilize some type of blocking technology on at least some of their public workstations. The most significant reason that so few libraries have utilized blocking technology is the policies, pressure, and practice of the ALA in advocating for unrestricted access by anyone, regardless of age, to all of the materials available on the Internet regardless of content, including the most deviant pornography. This includes child pornography, hardcore depictions of rape, sexual torture, sadomasochistic abuse, group sex, and sex involving urination, defecation, and bestiality.

Dangerous Access, 2000 Edition, reports on a project David initiated last year to follow up to his original *Dangerous Access* released in March 1999. With the help of the Family Research Council, David submitted Freedom of Information Act requests to all fifty state-library systems; responses were sent to him for study and analysis. Because of the explicit nature of many of the reported incidents that David highlights, reader discretion is advised; the material is clearly not suitable for children. David is the sole author of *Dangerous Access, 2000 Edition: Uncovering Pornography in America's Libraries.* As the reader will see in the following pages, David lays the blame at the doorstep of the ALA.

The following pages prove that library online-services are being used by adults and children to access illegal pornography and that libraries are scenes of public masturbation and other sex crimes, often with full knowledge of library staff, some of whom have refused to call police. The ALA has acknowledged that the First Amendment protects none of this material. It is the height of hubris and duplicity for the ALA and public librarians knowingly to provide this illegal material and attempt to wrap themselves in the Constitution. (An analysis of federal obscenity, child pornography, state material-harmful-tc-minors law, and the ALA Bill of Rights and Code of Ethics is provided in Appendix B.)

All who want to enjoy the services provided by public libraries with the knowledge they and their children are safe "in a welcoming environment" owe David Burt their deepest thanks for his momentous work. If Americans fail to act upon it and do nothing to stop the degradation and abuse of public libraries, it will be to their shame and loss.

INTRODUCTION

A six-month investigation of documents obtained through Freedom of Information Act requests to public libraries has uncovered more than two thousand documented incidents of patrons, many of them children, accessing pornography, obscenity, and child pornography in the nation's public libraries. Many of the incidents were highly disturbing, as librarians witnessed adults instructing children in how to find pornography, adults trading in child pornography, and incidents involving both adults and minors engaging in public masturbation at Internet terminals. Analysis of computer logs from just three urban libraries revealed thousands of incidents that went unreported, indicating that the 2,062 incidents represent only a fraction of the total incidents nationwide. The total number of incidents each year nationwide is likely to be between four hundred thousand and two million.

Nearly all of the nation's public library systems were contacted with freedom-of-information requests, but 71 percent of the public library systems ignored the requests. Both the American Library Association and a number of state libraries sent messages to public libraries suggesting ways that libraries could avoid compliance with the requests. Several state librarians

actually told public libraries in their states not to comply.

The incidents suggest that Internet policies alone do not deter crime on library Internet stations. The incidents supplied by libraries included 172 incidents where librarians described crimes being committed, such as the accessing of child pornography, the accessing of material described by the librarians as "obscene," public masturbation, and adults exposing children to pornography. In only six of these incidents (3.5 percent) were the police notified.

Obtained along with the incident reports were the Internet access logs of three public libraries that employ filters in Tacoma, Washington; Cincinnati, Ohio; and Dayton, Ohio. The logs reveal that among those sites blocked by filters, only 0.01–0.07 percent were nonsexual in nature. In other words, 99.93–99.99 percent of the time, the filter did not block innocent sites.

The failure of many libraries to prevent these incidents combined with the demonstrated effectiveness of filtering software supports the appropriateness of legislation to require the use of filters in public libraries.

WHY THIS REPORT WAS NECESSARY

According to a 1999 study in *Nature*, there are approximately 12 million pages of pornographic content on the Internet, accounting for 1.5 percent of all Internet content.[1] The anonymous environment of the public library offers the ideal place to access this sea of pornography. Children who want to avoid supervised access to the Internet at home and school, men who do not wish to risk their pornography habits being discovered

by their wives and children, transients without any other access to Internet pornography, pedophiles wishing to download illegal child pornography, and sexual perpetrators wishing to expose others to pornography would all be attracted to a public library to obtain free access to the Internet.

Many librarians report situations in their libraries where "porn surfers" create serious problems. Michael Schuyler, systems' librarian for the Kitsap, Washington, Regional Library System, describes the experience in his own library:

> "Porn Alley" is what we call it here—a row of PCs facing away from thereference desk with full Internet access. It's inhabited from the moment we openuntil the moment we close by brazen folk who, with no shame, will look atpornography no matter who is around or how shocking it may seem.[2]

Orange County, Florida, Public Library director Dorothy Field described her own situation:

> A number of people were coming into the library and accessing sites that wouldbe described as hardcore porn. I am not talking about *Playboy* and naked ladies. Iam talking about stuff in the back room of adult bookstores. They would view thisfor hours on end.[3]

The response of both the American Library Association and the "free speechcommunity," organizations such as the American Civil Liberties Union and People for the American Way, has been to discount such reports. Ann Symons, immediate past president of the American Library Association, recently said, "The whole issue of protecting children has been blown way out of proportion by the media and those who seek to

promote their own agendas."[4] Judith Krug, director of the ALA's Office of Intellectual Freedom, even went so far as to say that "their number is so small that it is almost laughable," and "only one child out of a trillion billion" might use library computers to seek out pornography.[5]

Other free-speech organizations have taken a similar line. Larry Ottinger, staff counsel for the People for the American Way, called filtering "an unconstitutional solution in search of a problem."[6] The ACLU has dismissed the many published accounts of patrons viewing pornography in libraries as "a few unconfirmed press reports."[7]

* * * * *

Library Incidents Involving Internet Pornography

The data for this report was gathered during two periods. Filtering Facts published *Dangerous Access, 1999 Edition*, in March 1999 after gathering the details from 613 freedom-of-information requests filed with public libraries. Three months later, the Family Research Council funded a more comprehensive series of freedom-of-information requests. Using the mailing list of *American Library Directory, 1997–98 Edition*, more than fourteen thousand requests were mailed to the nation's 9,767 public library systems.

	1999 Study	2000 Study
Request Sent to Public Libraries	613	9,767
Libraries Reporting No Incidents	NA	2,333
Libraries Reporting Incidents	114	338

After the responses were received, the total number of incidents from all the 452 libraries that reported incidents were tabulated and classified. The incidents, along with a few news stories published independently of this study, totaled 2,062. These incidents involved library patrons viewing pornographic material as defined by the incident reports using the terms "pornographic," "porn," "pictures of naked women," "obscene material," "sex picture," "sexually explicit material" "adult web sites," and "smut sites." Also included in the total incident number were incidents that featured the names of sites being viewed by patrons that were obviously pornographic in nature. Patrons viewing "inappropriate" material were also included because the request letter specifically asked for incidents of "patrons accessing pornographic or sexually explicit mate-

rial"; these incidents are, therefore, thought to be of patrons accessing pornographic material. Phrases used in these incidents included "inappropriate," "not appropriate," "objectionable," "violating policy," and "offensive."

Incident Reports, Patron Complaints, and News Stories	Number
Child Accessing Pornography	472
Adult Accessing Pornography	962
Adult Exposing Children to Pornography	106
Adult Accessing Inappropriate Material	225
Attempted Molestation	5
Child Porn Being Accessed	41
Child Accidentally Viewing Pornography	26
Adult Accidentally Viewing Pornography	23
Child Accessing Inappropriate Material	41
Harassing Staff with Pornography	25
Pornography Left for Children	23
Pornography Left on Printer or Screen	113
Total Number of Incidents	**2,062**

In addition, eight freedom-of-information requests were submitted to public libraries that use Internet filters and maintain logs of sites accessed by patrons. Three library systems supplied their respective incidents recorded in their computer logs:

Public Library	Number of Annual Incidents*
Tacoma, Washington, Public Library	1,764 (actual)
Cincinnati, Ohio, Public Library	30,159 (attempted)**
Dayton, Ohio, Public Library	14,358 (actual & attempted)***

* An *incident* in a library computer log is defined as a single unique Internetsession.

** Based on a fifty-two day sample. All recorded accesses were blocked.

*** Adults may override the filter. It is unknown how many blocks were overridden or the content of the sites blocked.

CHILDREN ACCESSING PORNOGRAPHY

A significant portion of the total incidents involved children. The category, "Child Accessing Pornography," accounted for 472 incidents. There were 673 total incidents involving children; that is 33 percent of the total. Most of the children were young adolescents, but many of these children were quite young. In some incidents, older children were showing the younger children pornography. The following incidents involved young children:

A patron at the Houston Library noticed:

A set of brothers using two side by side display monitors. One child about twelve was teaching two others about ten and eight years old how to access the pornography sites.

A patron in Bremerton, Washington, complained:

While my daughter checked out the books, my attention was immediately drawn to this vivid full

screen photo of a sensuous blonde with full frontal nudity! The 8-year-old boy operating the screen glanced around with a mixture of guilt and desperation written all over his face.

A staff member at the Kokomo Howard County Public Library in Indiana reported:

A young boy, about 9–11 years old, was signed up to use computer #1 for the Internet. He had purchased paper and was printing off pictures before we noticed that he was sitting at the wrong computer. Another patron who was signed up for computer #2 told us about the mistake. We asked the boy to move over to computer #1 and discovered that he had been printing colored pictures of obscene material. When the computer patron came over to use computer #2 we had to clear his sites in full view of the patron. We did not have any complaints and so we did not ask him to leave his sites. I discussed this incident with other staff members, so that we could watch him & monitor his behavior. We may want to take another look at our Internet policy.

A librarian at the Morton Grove Public Library in Illinois reported:

Patron reported that she had been working in a study carrel near the Internet terminals for approx. 2 hours. During that time she witnessed a male child, approx. 7 years old accessing adult oriented web sites at Internet station #3. When she would walk past him, he would quickly switch to another screen. The patron reported having seen staff stroll past a couple times. The patron brought this to the attention of desk staff. When I returned from lunch,

I spoke with her. Her main concern is that the Internet terminals are much too far away from the staff/information desk. She said that even if the staff patrolled by every 10 minutes, it still wouldn't be enough because the kids are so fast. She said the Internet stations should be directly in front of the information desk so that staff can easily see what the kids are into at any given moment. She is concerned with all the children who use this tax-supported library, not just her own kids.

These incidents often upset library staff as well as patrons. A branch manager of the Yakima Regional Library in Washington wrote to her director:

This is a difficult letter to write. . . . On Monday of last week a group of about eight to ten teenage boys came to the library and asked me if they could get pornography on the Internet. I replied that they could . . . Several pictures were printed of naked women from the waist up. Later that afternoon, one of the younger boys (elementary age) said that the big boys had shown some dirty pictures on the computer . . . First, it is against my personal convictions to provide pornography or X- or R-rated pictures to children. When I applied to work at the library, running a porn shop was not in the job description. A second and greater issue is that we are supplying pornography to minors without their parents' permission or knowledge. A staff member at the Seattle Public Library sent a similar e-mail to co-workers: Every day children are viewing materials that [they] are by law denied access to in other venues. Traditionally the library has offered free unfettered access to all materials to any person

regardless of age. The library also had control over what materials are available. The Internet is uncontrolled. The best and worst that humanity has to offer is there in vivid color and sound for anyone who can point, click, and type a few words. Why isn't the library providing protection from this kind of material? Immediate steps should be taken to form a policy on what children should and should not have access to.

More incidents involved older children, sometimes with very explicit pornography and chat rooms, as these library staff incident reports show:

A couple of our younger patrons were printing out porno from the Internet stations in the cubicles. They were between the ages of 10–12. These were explicit bondage photos. I discovered them quite by accident. It was closing and a printout was left in the printer. So, I would like to put an age of 14 restriction on the cubicles.

—Escondido, California, Library

At about 9:30 am, circulation forwarded a call to me from a mother concerned that her 12-year-old son had found "very explicit" and "disgusting" sexual pictures on our Internet computer, printed them and brought them home. She didn't seem to want to leave her name so I didn't push it. She claimed the child said an adult in the periodicals room showed her son where to find these pictures. I of course, clarified that she didn't mean a staff member. I explained that library policy is that we don't allow such things, etc. Once I got her to understand that the library has no control over what is on the Internet, she seemed to accept my answer.

—Grove City, Ohio, Library

A young lady about 13 years was using a chat terminal. As I walked by I noticed the word "f---ing" used a couple times. Next time I checked I noticed the screen said "Now I'm touching your t--s." Then it went on into "Now I'm f---ing. . . ." At that point I said to her that objectionable language shouldn't be used on the computers and she should switch to another chat site. She said she would and then logged off and left.

—Medina County, Ohio, Public Library

Shortly after the Columbine shootings in Littleton, Colorado, a librarian at the Bemis Public Library in Littleton expressed grave concerns to a supervisor about the possibility of another incident tied to the library:

Last Friday I met with a mother who was cleaning her 15-year-old son's room and looking around to see what he's been up to. What she discovered was a 2 inch thick stack of Internet downloads. The stack included 1. Credit card fraud—how to do it, 2. Counterfeiting money—how to do it, 3. How to make a portable grenade launcher, 4. How to make an auto exhaust flame thrower, 5. How to make dynamite, 6. Chemical equivalencies, 7. Light bulb bombs and tennis ball bombs, 8. How to hot wire cars, 9. Mail box bombs and smoke bombs, 10. Sexuallyexplicit pictures and sexually explicit stories like "how many loads of c—can Kaitlyn swallow?" In the wake of Columbine, his mother wanted to turn these and her son in for this. The investigation and interview of this boy revealed that ALL of these downloads came from the Bemis

library. There is no computer in the child's home and his mother confirmed that the only place she takes him is the Bemis library where he told her he does his homework. The kids also offered that it is widely known that you can get anything from the Internet at the library without any password, username or other information. Is there anything that can be done about this? We have enough problems with juveniles without giving them a library to gain access to whatever illegal and crime related material they want. I would hate to see where someone was injured or killed from a tennis ball bomb that the suspect offers they learned to make from an Internet download at the library. Ironically, the *Rocky Mountain News* had an article on it today (p. 22A). I want to let you know this appears to be a growing problem.

Accessing Internet pornography led some children to other behaviors. The director of the Grayville Library in Illinois stated:

> Five teenagers/young men lost computer privileges for accessing sexually explicit/pornographic web sites . . . Two of the young men actually entered the library after hours to access these locations. Needless to say, the matter was turned over to our local police.

Four children were even observed who appeared to be masturbating, one to bestiality. A Broward County, Florida, staff member reported that a

> Young man probably 13 or 14 years old had accessed something having to do with sex with animals. He acted strangely, perhaps also masturbating. I asked

> him questions about what he was doing and after a while he left.

In Ft. Collins, Colorado, a staff member wrote:

> Boy looking at pornography on the web and fondling himself. Sandy-haired boy of 11 or 12, hair cut short, rather chubby. A library customer telephoned the library to say that when he had been on a www station earlier he had looked up and seen a boy looking at "hardcore" pornography on station #9 and touching himself.

An incident report filed by a Ft. Vancouver, Washington, Public Library staff member noted the following:

> After several prior incidents of sperm being found by staff in the restroom on the floor after a particular set of brothers have been using the Internet and restroom, I approached one of the patrons, asked him into my office and told him that we had seen a pattern of sperm and his Internet use. After examining his hands for an extended period of time, I said that ejaculation was an inappropriate activity in the library.

Internet pornography, pornographic chat rooms, and masturbation at the library played a key role in the attempted molestation of a four-year-old boy by a thirteen-yearold boy at the Phoenix Public Library, according to this police report:

> On 6-29-98 at approximately 1430 hours, [S]ergeant Ruiz was contacted by a patrol sergeant reference an attempt sexual conduct with a minor, occurring at the Phoenix Public Library. . . .

Officer Jackson first talked with Cheryl ___, who informed him that she had arrived at the library approximately a little after 1:00 p.m. and her [four-year-old] son needed to use the restroom. She walked her son over to the restroom located on the second floor of the library and let her son go into the men's restroom by himself. Her son was gone for approximately 2 to 3 minutes when he came back outside and told his mother that there was a boy inside the bathroom who was willing to give him a quarter to "suck his d---."

Interview with Damian [Suspected perpetrator, age 13]. Damian told me he arrived at the library approximately 12 o'clock. He stated he had taken the bus from his house and that he comes to the public library daily. I asked Damian to tell me a little bit of what he does at the library. Damian stated that he always gets on the computer and gets on the Internet and goes into the chat room on the computer. He told me that his handle on the computer was Aqua 3000. He said he entered a chat room and began to talk with a subject who referred to himself as Macho Man 73, at which time this subject was making several remarks to Damian. Damian told me that the subject was typing in remarks such as he knows that his Mom smokes dope and that he was so skinny that you could hula hoop him through a cheerio. Damian stated that he changed from that chat room and went into a second chat room on the Internet and once again Macho Man 73 let him know that he knew that Damian was at the public library and asked him if he wanted to play truth or dare. Damian stated that he was willing to play that with this subject on the com-

puter at which time the subject told him to go into the boys restroom which was located on the second floor and ask another little boy if he would let him suck his d---. Damian responded back into the computer to Macho Man 73 and stated that he would do it.

I once again asked Damian if what he had done was right or wrong. Damian state[d] that he knew that this was wrong and that he has never approached anybody like this before. I asked Damian then why did he do it this time, to which he responded that it was a dare from the Macho Man 73 guy on the computer and that he just wanted to do it. I then asked Damian what he meant by earlier in the conversation that he was going to the restroom by himself. Damian told me that he was going to the restroom after he had been looking at pornography on the Internet and he would masturbate himself while inside one of the stalls in the restroom. He told [me] that during this two to four hour period while at the library he would go a minimum of two times each visit and masturbate.

—Phoenix Police Department Report, June 29, 1998

Patrons seeking to protect their children in some cases reported meeting with indifference or exasperation from librarians. As one incident report revealed, a patron wrote to the Sacramento Public Library after this experience:

> I was at the library with my children ages 7, 10, 12. A child was looking at an Internet file that I felt was not appropriate to view in a public place. On the screen was a photo of a nude woman lying with legs spread. Another person was touching her bottom

with his/her tongue. This child's activity was in plain sight of everyone who happened by the computer area or was descending the stairway to the "kids place." My children along with others in the area were unwilling subjects to this unsuitable material. When I spoke to the staff person, I was informed that she had no control in this matter, that is was the parent's responsibility to control their children. Unfortunately, the parent of this child did not appear to be in the area at the time.

In another incident report, a patron at the Novi, Minnesota, Public Library wrote to her library about her experience:

> On a Saturday afternoon when we visited the library, I observed a young man (around age 12 or 13) sit down at an Internet station. Within a matter of seconds he was viewing full screen, live action, pornography. He changed the screen a few times and viewed a variety of other pornographic material. I notified a librarian who told me "there's nothing I can do" and "this happens all the time. . . . I am especially bothered by the men who come in here to do this."

Another patron of Timberland Regional Library in Olympia, Washington, wrote:

> More and more as I visit the library I see children sitting on the computers looking at very graphic pornography. This time I glanced over and saw a young teen viewing an explicit image and an eight or nine-year-old boy was happily looking over his shoulder. I told the librarian who simply shook her

> head and said there was nothing she could do about it.

These reactions by the librarians are consistent with how the ALA instructs librarians. A recent ALA pamphlet for librarians, *Frequently Asked Internet Questions*, addresses the question, "What do I do when I find a child looking at sexually explicit information online?" The answer given states: "Public Libraries do not have policies that restrict the content or use of information provided by the library. Therefore, these policies also protect Internet use."[15]

PUBLIC LIBRARIES AS CONDUITS FOR CHILD PORNOGRAPHY

One of the most serious problems with anonymous, unfiltered Internet access is the use of libraries as conduits for the distribution of child pornography. Filtering Facts documented forty-one of these incidents. Many public libraries employ policies that would seem to encourage the illegal transmission of child pornography.

Many public libraries not only have privacy screens, but also destroy patron sign-up sheets after use, and employ computer programs that delete any trace of user activity. These policies make it very difficult for law enforcement to catch pedophiles using public library Internet stations to download child pornography. Indeed, such an anonymous environment of Internet access would seem attractive to pedophiles, since there is little chance their crimes will be traced back to them. At the Multnomah County, Oregon, Public Library and the Los Angeles Central Library, pedophiles have taken advantage of the anonymity to run child

pornography businesses using library computers. The *Los Angeles Times* reported:

> A convicted child molester who routinely used computers at the Los Angeles Central Library to collect and distribute child pornography was arrested after planning what he thought would be a sexual liaison with six youngsters—one as young as 3, police said Thursday . . . "He would go to the library as soon as it opened up and signed up to use each computer on each floor. . . From there he maintained his Web site, while e-mailing and communicating with members of his club. He sent me as many as 300 images of child pornography."[16]

The response of librarians to the transmission of child pornography in their libraries at times encourage these activities. Only five of the forty-one (12 percent) incidents of child pornography were reported to the police. Librarians actually observed the child pornography on thirty-three of these occasions reported to Filtering Facts. Among the material librarians described seeing were "nude pictures of young boys and girls" (Brevard County, Florida), "pictures of babies attempting sex" (Jeffersonville, Indiana), "pictures of naked little boys," (Grand Rapids, Michigan), and a photo that "showed a child no more than five with a man's penis in her mouth," (Olympia, Washington). In one incident report, a patron at the Sunnyvale, California Library complained because the librarian did nothing:

> During a visit at the copy machine once I was able to view one of the monitors for the Internet screen. The person was viewing child pornography. I complained tothe library staff and was informed that

> nothing could be done to stop this. I was very shocked and frustrated!

Some librarians confiscate the material, issue warnings, or bar the patron from the library, as this staff incident report from the San Diego Public Library reveals:

> Patron was using the Internet along with 2 young boys. Mr. W. was standing behind them about 8 feet away. Patron turned around and said something to Mr. W., which he could not hear and he moved closer to ask what he said. Patron was verbally abusive to Mr. W. and used foul language. Mr. W. observed that patron was viewing nude pictures of young boys and girls on the Internet and he reported it to library staff. I escorted Mr. W. to another area in the library and returned and asked patron to leave because of his inappropriate use of library equipment. I reminded him that he had been warned several times about this kind of behavior. Patron refused to leave. At this time I told him if he didn't leave voluntarily, I would call the police and have him removed. Patron continued to use the Internet for about 10 more minutes before police arrived. I signed a trespass order against patron.

A staff report from the Skokie, Illinois, Public Library is similar:

> Our biggest complaint has been ____. I did approach a man on the reference side who was bringing up pictures of babies attempting sex. I explained that this was inappropriate and we had several children in the building at the time. He said OK, but was trying to download to a disc.

Yet not all librarians are as responsive. At the Sonoma, California, Public Library, a staff member sent an e-mail message to his supervisor stating:

> There are 3 men on my shift who come in regularly, perhaps daily. One views child porn of nude boys in tubs. . . . These images are clearly visible. . . . What does it mean to have child molester posters up in our staff lounge & yet we make daily Internet appointments for someone to watch kiddy porn in the library on the library comp? Isn't this crazy?

But the supervisor responded:

> I don't like it either, but there is nothing we can do about it. The best thing for staff is to ignore it . . . please use your time in more constructive ways.[17]

One of the five incidents where the library actually notified police occurred at the Lakewood, Ohio, library. In an account from the *Akron Beacon Journal*:

> But it was the library more than the police and prosecutor that alarmed Chris Link, executive director of the American Civil Liberties Union of Ohio. "Traditionally, librarians have protected their records of lending activity to the point of being subpoenaed or going to jail," she said. But now, she said, "librarians are scrutinizing what it is you look at and reporting you to the police." In the case of kiddie porn, Link said, such scrutiny "would seem to make sense" until it is viewed in light of the government's history of searches for socialists and communists or members of certain student movements.[8]

The Callaway County Public Library in Missouri even actively resisted police efforts to investigate a patron accessing child pornography. Library staff

refused to cooperate, even when issued subpoenas. The county attorney explained in a letter to the library:

> When Fulton police received a report of a man going to the library, accessing the Internet on the library computer, using that library Internet access to view child pornography and then using the library equipment to print out child pornography at the library, an officer went to investigate. The officers and I were shocked that the library through you and Nancy resisted cooperation rather than doing everything you legally could to help.

Finally, the pedophile monitoring group, PedoWatch, has confirmed that on-line pedophiles are telling each other to use public libraries to download child pornography. PedoWatch is "one of the oldest organizations on the Internet that is working with law enforcement worldwide to remove child pornography and child luring activity," and currently works with "over 125 law enforcement officers" to monitor the activities of online pedophiles. The director of PedoWatch, Julie Posey, wrote the following in response to a query from Filtering Facts:

> Basically what happens out there is that pedophiles on the Internet "network" together. It is much like just about any other interest that a person may have. There are mailing lists, message boards, chat rooms and multitudes of other resources that they use. When a particular pedophile finds that the library is a safe secure place to view and download pornography, he shares this information with others with his same interests that he comes in contact with. Some libraries won't allow downloading so that information is passed on too. Remember that beforethere can be child pornography in the first

place, there has to be a perpetrator and a victim. I have seen cases where pedophiles on the Internet use the library to talk with children and eventually lure them to have a face-to-face meeting. These children are then molested, photos taken and further exploited when he sends the child's pictures to masses on the Internet.[19]

ADULTS EXPOSING CHILDREN TO PORNOGRAPHY

There were 106 incidents of adults exposing children to pornography. In most of the incidents, the adult porn surfers appeared simply not to care who was around, even openly viewing pornography in children's departments, on terminals set aside for children. Several reported incidents contained letters from parents describing scenes they witnessed in public libraries:

> My fifteen-year-old daughter returned from the library recently, visibly upset, and told me that the computers in the library were being used by patrons to view pornography. She personally observed graphic pictures on the screen and also stated that the computers in the children's section were being used by a minor to participate in an adult chat room.
>
> —Seminole County, Florida, Library

> I am writing this letter to inform you of a very real problem that demands yesterday's attention. Specifically, the problem is a blatant abuse of the PC's that have Internet access. I learned last week that my six year old daughter, while walking through the PC area, came across a young man who had movie footage of two men engaged in oral sex displayed on his PC screen. My ex-wife went directly to the front desk and reported this situation. A few minutes later she saw the man leave the library. What type of controls does the library have on the PC's? With all of the filtering devices available through the Net am I to understand one or more of the PC's are not filtered? Let me propose to you a simple solution. Turn the PC's in such a direction that allows the front desk a view of what is displayed on the screens. My other solutions are not quite as constructive.
>
> —Brookfield, Illinois, Public Library

> I am so appalled at the pornography displayed on the computers by adult users! My 11 year old son and I were flashed by one of these men with this obscenity on the screen. Why is this not prevented? The look on my son's face was horror!
>
> —Lafayette, Louisiana, Public Library

> The man next to my 13 year old daughter was in a party/chat room discussing extremely obscene material via the Internet . . . This man seemed to be very excited during his conversation on the Internet and I was uncomfortable leaving my daughter next to him.
>
> —Orange County, Florida, Public Library

In most states, exposing children to pornography is a crime. Yet not one of these 106 incidents was reported to the police by library staff. Other incidents involved adults actually interacting with children and the use of pornography, as these three library staff incident reports illustrate:

> Patron __ used the Internet from 9 to 12:45. He was observed in inappropriate sites, and was also observed showing younger children how to view power rangers on the Internet. Staff member

Karen asked him not to allow children to view the Internet, then he was warned by staff member Donna about site[s] which could be construed as pornographic.

—Clermont County, Ohio, Public Library

White male with glasses and straight blond hair with balding on top. Man was "skinny" and wearing a white T-shirt. Three young boy[s] (8-9 years old) were waiting to use an Internet workstation. When the man using the workstation finished, he handed a paper to the boys with the following URL: persiankitty.com (see attached). The boys accessed the site and discovered that it was pornographic. They came to the Reference desk and explained the situation to_____ referred them to me. I asked them to repeat their story. According to the boys, the man gave them the paper with the UR[L] and told them, "Look up this. You'll like it." I cautioned the boys against talking with strangers. I told them to come to the Reference Desk if someone was bothering or worrying them. I thanked them for telling us about their situation. They didn't want to give their names or telephone numbers.

—Kern County, California, Public Library

A young boy (about 12-13) complained about an adult male who was viewing "bad pictures" on the Internet behind the reference desk and that the man was harassing the young boy about doing his homework on the Internet.

—Salt Lake County Public Library

PEDOPHILES LURING CHILDREN THROUGH LIBRARIES

There were five incidents of pedophiles attempting to use the library to molest children. All five cases involved Internet access. The first report was published in the *Southwest Arkansas Times*:

> Jill Michelle Cronk, 26, was charged with third-degree carnal abuse for allegedly fondling a 14-year-old girl she had typed messages to over a lesbian chat line on the Internet. The girl corresponded with the woman on the Internet using a Fort Smith Public Library computer. Cronk, who had talked to the girl over the Internet for about a month, caught a flight to Fort Smith Tuesday afternoon and met the girl at the library branch on Market Trace, detective Cpl. Ron Scamardo said.[20]

The second report was submitted by staff at the St. Charles, Missouri City-County Library:

> Stepmother called me, reported that Josh is 17, has been at Fulton for two years in treatment for sexual offenses. Josh was using their computer at home to view pornographic sites . . . a violation of his treatment plan. . . . She found him at the library and discovered what he was viewing [pornography] and reported it to staff. . . . When I finished my conversation with her he was in the company of a younger boy who looked about 10-years-old. . . . The police were called and discovered outstanding warrants against Josh.

The *Charlotte News & Observer* supplied the third report:

> A Harnett County man has been charged with using the Internet on public terminals at the county li-

brary to offer his 7-year-old daughter for sex . . . He was using a free e-mail service to solicit people to have sex with his daughter, officials of the State Bureau of Investigation said. The incidents began in June and continued through October, when the e-mail account was discovered by the man's estranged wife . . . The warrant said the man told his wife he was using computers at the Harnett County Library. The suspect "had access to numerous libraries and may have been using multiple sources to access his account," said Sabrina Currin, a sheriff's detective.[21]

A fourth case involving a thirteen-year-old boy's attempt to molest a four-yearold after viewing pornography and using a pornographic chartroom in the Phoenix Public Library is described earlier in the section "Children Accessing Pornography."

Two incident reports claimed perpetrators exposed themselves in front of children:

> We had a report from a mother who had left her child, a girl about 7 years old, alone in the children's room. When she returned the little girl's screen had up a picture of male frontal nudity. There was an adult man sitting next to the girl. After the mother grabbed her child and left the area the little girl told her mother that the man had exposed himself to her. When the mother returned to the children's room the man was gone. The mother did not want to report it to the police.
>
> —Jefferson County, Colorado, Public Library

A mother in Ft. Lauderdale, Florida, writes of her daughter's experience at the Broward County Public Library:

> In mid-September, I dropped my daughter off at the public library while I attended a morning class. When I picked her up, I could tell something was wrong, but it took her several minutes to tell me what had happened. She told me that she had seen a man sitting at a computer and he was looking at naked women. She then told me that she had seen him touching himself "down there." I immediately turned around and went back to the library. My daughter, who is 12-years-old, told me that she went to the information desk right away to report what she had seen, but the library staff member did not call the police. He did a search of the library, determined that the man had left the premises, and asked my daughter if she wanted to fill out an incident report. I spoke with this same library staff member. I told them I wanted the police and campus security called. One of the library staff said there was nothing the police could do, but I insisted that the police be called or I would call them myself. A report was taken by the police, campus security, and the library. My daughter was so traumatized by the incident, that she could not remember her address or phone number, and she had to be hospitalized the next day for post-traumatic stress and suicidal intentions with intent. Later the following week, I learned that this man had come back to the library again, and he was escorted off library property and given a "no trespass" warning. The library staff failed to obtain this man's name, address, phone number, or any other identifying information before giving him this warning. I also learned from

a staff member, that this man had been reported doing the same thing on six prior occasions without the police being notified. It is the policy of the library that the police not be called for any criminal activity unless directly asked by a patron of the library to notify the police department. My daughter continues to have nightmares about this incident and she is currently in therapy and on medication. At one time, she loved going to the library, now she is terrified to enter the building.

The problem with pedophiles using library computers to lure children has become serious enough that it is even being explicitly mentioned in the terms of supervised release for Internet sex offenders, as this article from *The Roanoke Times* describes:

A man who called himself "Dr. Evil" was sentenced in U.S. District Court Wednesday to 37 months in prison on charges related to his attempt to lure a 13-year-old girl into a sexual encounter. Raymond P. Canupp, 41, of Charlotte, N.C., was also fined $3,000, and must serve three years of supervised release after he leaves prison, said Assistant U.S. Attorney Rusty Fitzgerald of Lynchburg. Canupp, who called himself "Dr. Evil" on the Internet, was caught in the BedfordCounty Sheriff's department's cyber sting operation. U.S. District Judge NormanK. Moon prohibited Canupp from owning a computer, possessing a computer, andeven being around a computer with an Internet hookup. "For instance, he couldn't go to a cyber cafe and sign on and check his e-mail like you and I could," Fitzgerald said after the sentencing. The restriction also keeps Canupp away from libraries with online services, he said.[22]

ADULTS ACCESSING PORNOGRAPHY

The majority of the incidents involved adults. There were 962 incidents of adults accessing pornography. A number of these incidents described adults accessing material, such as bestiality, that could fall under obscenity laws. On twenty-five occasions, library staff reported seeing patrons accessing material the librarians themselves described as obscene. Again, even though accessing and displaying obscenity is a crime, it appears that in none of these incidents were police called. Porn surfing by adults has created such a hostile environment that some patrons no longer feel comfortable in the library, as these three letters from incident reports indicate:

We must also consider that the library should not become a "hostile environment" where patrons must guard against accidentally seeing something obscene. The privacy screens only blot out so much. I still recall how uncomfortable I felt six months ago when a younger teenager nervously watched me and everyone else who had walked past him and the computer he was using. Not comprehending his concerned look, I looked back at him and inadvertently saw the word CHEERLEADERS scroll across the screen, and then an image started to appear. I walked on, still being watched. I felt like I was somehow an intruder. Suddenly, after forty years of going to the library, it didn't seem such a safe and friendly place anymore.

—Sno-Isle Library System, Marysville, Washington

I am writing a letter expressing the fact that the public library has now become completely unusable for me and my family. My husband and I went into

the public library in Silverdale to look at some house plans on the Internet. I was shocked to look over and see the man next to me looking at pornography. Right in the middle of our public library a man was watching sexually explicit acts. My children will never enter the library again until there is some kind of blocking on this. I will never vote for another library levy again because it is now unusable to me. My children are 8, 10, 12 and have used the library for years. But not again.

—Kitsap Regional Library, Bremerton, Washington

Is there any way you could move the Internet stations outside of the 4th floor study rooms? I am a student who studies here 5 days a week and almost daily the station is occupied by 1 or more men looking at pornographic and violent scenes on the Internet. These men are occasionally loud and they spend time staring into the study rooms while printing out pornography. I'd feel very uncomfortable if the door didn't lock and feel it necessary to bring a cell phone in with me every day.

—Denver Public Library

Library staff also reported they felt these conditions were creating an unsafe or unpleasant work environment, as these staff memos to supervisors show:

Since we do not have a filter system, we do have patrons that pull up pornography, and I tell you, I hate it. I don't care if someone chooses to look at pornography, or to not use that term, nekkid people having sex on the computer screen, in their own home, but please don't expect me to see it in my workplace. It really affects me when I have to go tell someone to remove that site from their screen

because it is against policy. I don't mind telling them, but I end up getting a close up view of what they are looking at.

—Public Library of Charlotte and Mecklenburg County, North Carolina

I know this is not the first time I have expressed this, BUT I feel a need to express myself on this issue again. I am personally offended having to work in surroundings where pornography is openly viewed. Today I was photocopying the time sheets and I had a full view of the Internet workstation and could very clearly see 10 feet away what was being viewed. The privacy screens do not work from straight on. They only omit a sidelong view. I thought the info from Project Hope was very interesting in the Commission packet. I especially agree with their points on workstations in the children's area. Thanks for letting me vent.

—Sonoma County, California, Library

Tonight at 5:05 p.m., I confronted a man named___ on Internet #2. He was attempting to hide the screen he was viewing by pulling down the "Please Sign in at Reference Desk" sign, and peeking under. I met his gaze, looked at the screen and told him he needed to log off that terminal. There were over 40 windows of pornography open, and I told him to close them. Up at the desk, I informed him that he was no longer able to use the Internet in the library, as he had violated the policy. . . . I'm tired of confronting these men, and I'd be happy to put filters onall PCs.

—Irdell County, North Carolina, Public Library

Other staff memos and incident reports also depict uncomfortable librarians:

> Viewing pornographic sites including bondage—naked women in chains. When spoken to, he shut down the site to a point where we couldn't back screen into sites. Jennifer complained that sites made her uncomfortable as she was using the other workstation.
>
> —Saint Charles, Illinois, Public Library District

> Patrons are viewing pornography and 1 man took great joy in embarrassing a staff member by leaving a picture of 3 women having sex on the screen and then calling her attention to it. It appears to be the same little group of people who are doing this. The material they are pulling up ranges from the average Playboy centerfold to explicit photographs of genitalia or people having sex. There are also photos of women in degrading situations.
>
> —Kansas City, Kansas, Public Library

> Type of Incident: Verbal/Sexual Harassment Date of Incident: Ongoing ___began using Netscape about 3 or 4 weeks ago. He tries to engage in conversation and frequently turns around and looks at me. He found out my name and calls me on a first name basis. He's asked where I live and I didn't tell him. What makes me particularly uneasy is I have to lean over to log him back on. A few times I've noticed him viewing partially clothed women on Netscape, which adds to the awkwardness. . . I'm not going to work the desk when he's there. Claudia and I have discussed this and we have discovered that Mr. ___ is also bothering other

> staff discussing the "only soft-core" pornographic pictures he is printing out. We are trying to reschedule Claudia's hours so she can avoid him.
>
> —Harford County, Maryland, Public Library

Finally, a group of forty-seven librarians and other library employees of theMinneapolis Public Library published this letter of protest in the *Minneapolis Star Tribune*:

> Every day we, too, are subjected to pornography left (sometimes intentionally) on the screens and in the printers. We do not like it either. We feel harassed and intimidated by having to work in a public environment where we might, at any moment, be exposed to degrading or pornographic pictures.
>
> While the American Library Association (ALA) and our Minneapolis Public Library administration have taken the firm stand that restricting Internet access in any way is unacceptable censorship, most of us working directly with the public disagree. The issue is not one of intellectual freedom, but rather whether obscene material should be publicly displayed. If a *Penthouse* magazine cover must be kept out of public view in a grocery store should not the same principle apply in a public library?
>
> Compromise solutions do exist, and are being used successfully at other libraries. Sophisticated filters could provide intelligent monitoring on those terminals in high access areas of the library.
>
> Contrary to the "official" line of the ALA, filters can be designed to allow searching of topics such as

"breast cancer," while at the same time blocking most pornographic sites. And for patrons wanting unrestricted access, a number of nonfiltered terminals could be located in a less-traveled area of the library. With such an arrangement no one's rights would be violated.

Libraries across the country are coming to the realization that they must deal responsibly with the problem of Internet pornography, or permanently lose patrons . . . .

At our reference desks we hear numerous complaints, often from parents with children or teenagers in tow, and many say they are not coming back unless the situation is improved. Yet letters and calls to our director and to the Library Board have gone unheeded.[23]

Some urban public libraries report that their Internet stations are almost taken over by porn surfers, as this news story shows:

> In the Los Angeles Central Library, for instance, the machines are regularly steered to online photos of naked women, digitized videos of sex acts and ribald chat-room discussions. A few patrons even use stolen or made-up credit card numbers to visit pay-per-peep porn sites, according to a browser familiar with the scam. Despite a 30-minute time limit on Internet use at the Los Angeles Library, for example, legitimate researchers sometimes have to wait in line because the machines are tied up by people perusing personal ads or X-rated chat rooms. One of the sex browsers, an 18-year-old college student who declined to be identified (we'll call him Patron X), says he and at least half a dozen

> friends—plus assorted businessmen and "street people"—routinely cruise the Central Library Internet for porn. That last part, computer-savvy homeless people, might seem hard to imagine, but Patron X says they're "really good at this. . . . We trade secrets." One of the most prized tricks: finding Internet sites that post credit-card-number formulas that can be used to get into live-action Web sites where customers must pay up to $10 a minute to type instructions to a stripper and watch her perform as requested.[24]

There were thirteen incidents where library users were engaged in public masturbation. Nine of these were adults, and four were children. (For details, see the previous section on "Children Accessing Pornography.") Most of these incidents would violate state laws against indecent exposure or public lewdness. Once again, police were seldom called.

The Broward County, Florida, Library recorded four separate incidents of public masturbation, and only saw fit to bar a single user from the building. The records detail the following occurrences:

> Masturbation while viewing porn sites. Main Library—RIS (3rd floor). Fort Lauderdale Police Officer on the scene. Sergeant___ approached me about a young man using the computers who was viewing porn sites. Patron had been escorted out the library earlier this week by an officer(?). I approached the young man to investigate the report. The young man was sitting at the computer masturbating. I called his attention to his action and he instead continued. Sergeant ___ then told him to leave. Sergeant ___ warned him not to return to this library or risk being arrested for trespassing.

Sgt. ___ told him not to come on the property as well.

I was coming back from a break at 3:45 and ___ informed me that she had just called security due to an incident with a patron. ____ said that as she was escorting an elderly lady to the medical reference index table, she saw this young man watching a Java script movie of a man masturbating. ___ asked him to get off the web site. She went back to check a second time and she said the patron this time had his hands in his pants and continued to be in the unauthorized web site. Security escorted the patron outside the building. The defendant was given a verbal trespass warning on July 9th, 1998 by this officer after being asked by library staff to leave the library after he was observed looking at sexually explicit material and at the time of contact he appeared to be fondling himself. Subject had at that time his pants unbuttoned which was observed by librarian. Subject ___ continually re-enters library and did so today and was subsequently arrested.

Other library staff reported similar masturbation incidents:

This man is a regular user of Internet IP station where he views sites that feature female nudity. Frequently this man places his hand in his pants and has been observed doing this during the past several weeks. Today I approached him and asked that he not place his hand in his pants, stating that it was inappropriate behavior. I asked if he understood what I was saying—he shook his head "yes" but made no other communication.

—Highland Park, Illinois, Public Library

Just after we had opened a patron wanted to use the reference dept superstation. I walked over to the computer and noticed a condom lying right by the keyboard. It was not in a package and appeared to have been used. I had worked the evening before and had been the one to shut down the computer. If the condom would have been there then, I'm sure I would've noticed. I grabbed a handful of tissues and picked it up and threw it away. Then I sprayed cleaner on the area and wiped it up and apologized to the patron who had witnessed the whole thing.

—Kansas City, Kansas, Public Library

A regular customer told me he was working on computer #3 and the man next to him at #2 was masturbating. I approached the person and said we had a complaint and please remember that you are in a public place where the nude pictures on the screen might offend others. Person left a few minutes later.

—Ann Arbor, Michigan, Public Library

As I was walking in at the start of my shift, the librarian on duty took me to the back to tell me that the person we caught masturbating before was here and doing it again. I walked around the computer stations and noticed patron had a pornographic image up on the screen and was looking around very nervously. After watching for a few minutes I could see movement of the left hand which appears to be masturbation. So I approached patron and let it be known that that kind of behavior is against the library rules of behavior and that the library will not tolerate it. I told patron to leave and not to re-enter

for another month. I took acopy of library ID and handed patron a copy of the rules of behavior.

—Ann Arbor. Michigan, Public Library

Today one of our long time porno viewers got out of hand. He was viewing some porno and masturbating. J.____ and I both agreed—it was obvious in many ways. Marlene ___ advised me to call after we discussed it. 6 month T.W. issued—no further incident.

—Orlando, Florida Public Library

This Indiana patron filed a similar complaint:

I have seen a man bring up teen porn with pictures of totally naked guys on the screen and rub himself in the genital region while viewing this. Children from the age group of 7 on up were in the Reference Dept during this time, including my 2 daughters. This incident happened 11/5/98 between 7–8 PM. I informed the librarian at the desk and she then informed the man that he had to get off of the Internet. I have seen this same man bring up Internet sites with pictures of naked men on other occasions.

—Michigan City, Indiana, Public Library

THE EXTENT OF THE PROBLEM

How extensive a problem is the viewing of pornography in public libraries? This is a difficult question to answer, because no scientific studies have ever been conducted addressing what public library patrons access on the Internet. When the author testified before the National Commission on Library and Information Science in December 1998, he requested that both the National Commission and the ALA conduct such studies.[25] The request was ignored.

The 2,062 documented incidents in this report only tell a small part of the story. Only 29 percent of the public library systems in the country even responded to requests for information about the use of pornography, and these reports include only those incidents for which there was documentation that the library was willing to provide.

Actual measurements of Internet access in public libraries strongly suggest a much bigger problem than is reflected by the incident reports themselves. Internet access log-files from public libraries suggest that between 0.5 percent and 2.5 percent of public library Internet access is pornographic. Five public libraries took actual sampling data of what library patrons were accessing, based on logs generated by filtering or monitoring software. Three of these libraries also recorded the number of incidents, defined as a unique Internet session where a patron accessed or attempted to access blocked material. For a complete discussion of how this data was gathered and analyzed, see Appendix A.

Public Library	Number of Annual Incidents	Percent of Sites Classified as Pornographic
Chicago Public Library	N/A*	5.00
Tacoma Public Library	1,764 (actual)	0.95
Cincinnati Public Library	30,159 (attempted)**	0.53
Kalamazoo Public Library	N/A*	0.50
Dayton Public Library	14,358 (actual & attempted)***	0.36

• Gathered using monitoring software. No actual filtering took place.

•• Based on a 52-day sample. All recorded accesses were blocked.

••• Adults may override the filter. It is unknown how many blocks were overridden, or the content of the sites blocked.

The wide variation among libraries is almost certainly the result of different polices and procedures. The Chicago Public Library has unfiltered, unmonitored Internet access from workstations equipped with privacy screens. The Cincinnati Public Library has completely filtered workstations with no privacy screens and a monitoring policy. Tacoma and Dayton have "partial filtering." Dayton allows adults to override blocked sites; Tacoma displays blocked sites, but deletes all images. Kalamazoo has a monitoring "tap on the shoulder" policy.

Estimating the percentage of Internet use devoted to pornography in public libraries nationwide is problematic based on this sampling, for a number of reasons. The sample size, five, is small and is composed disproportionately of urban libraries. Urban libraries are thought to have higher incident rates because of the greater degree of personal anonymity than in smaller communities. Three of the five (60 percent) have partial or total filtering, compared to just 15 percent nationwide.[26] Total or partial filtering obviously decreases the number of incidents.

Kalamazoo, Michigan, probably comes the closest to representing a typical public library. Located in the Midwest, it serves a medium-sized population (116,000) and has a "tap on the shoulder" policy where porn surfers are instructed to stop if seen. The percentage of pornographic web sites accessed (0.5 percent) may be

typical for similar libraries.[27] Other libraries, like Chicago, employ "privacy screens," which no doubt encourage porn surfing, and likely record much higher rates, such as Chicago's 5 percent. These urban libraries with lax Internet policies make up a large chunk of the nation's thirty-nine thousand public library Internet terminals.[28]

Therefore, an estimate of between 0.5 percent and 2.5 percent of Internet use in public libraries is probably for pornographic purposes. This might sound trivial, and indeed the Chicago Public Library even stated that its own pornography rate of 5 percent "allows us to paint the far-right agenda as much ado about not very much."[29] Yet when one considers--based on state statistics of annual Internet sessions—America's public libraries had approximately 82 million Internet sessions last year, the problem is not trivial.[30] This would indicate an annual incident rate of between four hundred thousand and 2 million.

This suggests massive underreporting of incidents, and indeed comparison of the number of incidents written in incident reports and patron complaints to

incidents recorded in log files strongly supports this conclusion:

Library	Number of Written Incidents*	Number of Annual Log Incidents
Cincinnati, Ohio**	14 (Since January 1996)	30,159 (attempted)
Dayton, Ohio***	0	14,358 (actual & attempted)
Tacoma, Washington	8	1,764 (actual)

* An *incident* in a library computer log is defined as a single unique Internet session.

** Based on a 52-day sample. All recorded accesses were blocked.

*** Adults may override the filter. It is unknown how many blocks were overridden, or the content of the sites blocked.

* * * * *

THE SOLUTION

The nature of the incidents and their volume speak for themselves. No further commentary is needed to highlight the seriousness of the problems open access to obscenity, child pornography, and material harmful to minors is causing in the nation's public libraries. It is to be hoped that this report will finally move the discussion beyond "Is there a problem?" to "What is the solution?" Public libraries have attempted a number of ways to address the pornography problem, but practical solutions revolve around picking one of two options: monitoring patrons or filtering Internet access.

WHY CURRENT INTERNET POLICIES DO NOT WORK

Most public libraries have an Internet policy. These policies range from terse statements about the library not being responsible, to detailed rules of behavior. A

common policy is the so called "tap on the shoulder" policy, where library staff monitors use and gives a "tap on the shoulder" to anyone seen viewing pornography. As these library staff incident reports illustrate, this leads to a game of "hide and seek" with porn surfers:

> He's here at the Internet! Just wanted to alert you. Someone said that he's getting quite slick. He goes back and forth between innocuous and offensive screens quickly if he thinks someone is looking. And he doesn't appreciate librarians behind him.
>
> —St. Louis County, Missouri, Library

> I just closed out another computer with a long list of porno sites. My problem with this man is that he always comes at lunchtime and goes to one of the computers down on the end (6 or 7). I noticed once before that he'd been viewing porno, so I tried to catch him today. But he knows how to toggle out by the time I get all they way down there. If I stand at a computer nearby he watches me until I leave. Then (after he leaves) I find this string of "objectionable" sites. Because our schedule varies, I'm not usually assigned in here at lunchtime. Should I pass this info along to the rest of the staff (or to the lunchtime person) so someone can try to catch him? Or should I consider this confidential information? (I hate having to deal with this stuff.)
>
> —Medina County, Ohio, District Library

> Reported that she had been working in a study carrel near the Internet terminals for approximately 2 hours. During that time she witnessed a male child, approximately 11 years in age, accessing adult-oriented web sites at Internet station #3.

When she would walk past him, he would quickly switch to another screen. The patron reported having seen staff stroll past a couple of times.

—Skokie, Illinois, Public Library

I found him looking at a site titled "Farm Sex." As I approached, he must have sensed my coming because he clicked out. I told the reference desk what I saw and as I walked back toward the machine on the screen was another "Farm Sex" site with a photograph of a woman lying in the hay legs spread apart. When I got closer, I heard him mutter "oh my gosh." I told him that we had a talk yesterday about this same subject. He kept saying he didn't know how he got to these sites. After he left I looked in history and the site he was looking at was *www.wilma.farmsex.net* with several web sites listed beneath. This seems like a big waste of time for us to constantly monitor someone's Internet session for inappropriate material, especially when the sign says "Research Only." In my opinion, if we see someone looking at things that are not research related, they should not be using the machine.

—Davis County Library, Farmington, Utah

While police more often were called for the most serious type of crimes, such as attempted molestations,

nearly all other crimes went unreported, as the chart below illustrates:

Crime	Number Documented	Number Reported to Police	Percent Reported to Police
Accessing Child Pornography	41	5	12
Accessing Obscenity	25	0	0
Exposing Children to Porn	106	0	0
Public masturbation fondling	13	1	8
Total	172	6	3.5

Often sexual perpetrators in libraries do face consequences for their behaviors, but in comparison to arrest, they are trivial, as these library staff incident reports illustrate:

Viewing pornography. __ reported him to me. He said he had just clicked there. I was about to believe him when a print of a very inappropriate picture came out of the printer. I then looked at the stack he printed. All were of pornographically obscene subjects. I confiscated and tore them up. Please talk to and ban for 30 days.

—Rockford, Illinois, Public Library

Offense by patron displaying material reasonably construed to be obscene. 2nd offense = banned for 60 days. 3rd offense = banned forever.

—Delphos, Ohio, Public Library

_____ was in on Saturday afternoon. Enclosed are cover sheets of what he was viewing on the Internet

and printing (*www.hotpeep.com, www.bizar.com*). Not only was he viewing inappropriate web sites, but he was doing so while sitting next to a girl who was about 11 years old. I explained to him the policy and asked him if he thought what he was looking at was appropriate viewing for the young girl sitting next to him. He did not answer.

—DeKalb County, Georgia, Public Library

Patron who had been previously warned about using the Internet to access pornography came in at about 12:45. Staff began to keep an eye on what he was doing and at about 1:45 I saw him looking at child pornography. I told him his search was inappropriate and that I was going to need to file an incident report about this. He said "OK." The name he gave me was ___. (I asked him to spell the last name.) He then immediately left the building. . . . Could find no patron record under the name he provided.

—Salt Lake City, Utah, Library

We reprimand maybe one person a month [for viewing obscene material]. Two reprimands and your Internet privileges are revoked for a month. Three and they're revoked permanently. We've only had to do this twice, and both the patrons were adult men who were accessing kiddy porn. This is illegal, so we probably should have called the cops.

—Tuscarawas County, Ohio, Public Library

Sexual perpetrators who frequent public libraries probably are aware that they run a low risk of apprehension in when 96.5 percent of the time the worst consequence they face if caught committing their criminal acts is being escorted from the library.

While some public libraries fail to inform the police of more serious crimes, one library saw fit to have this woman arrested, as reported in *American Libraries*:

> Beverly Goldman, 24, was arrested January 13 for failing to appear in court after being charged with not returning seven children's books and videotapes she had checked out more than 16 months ago from Clearwater, Florida Public Library. Before taking her into custody, police allowed Goldman, who is seven months pregnant, to see her five- and six-year-olds off to school. She spent eight hours in jail before friends and relatives posted bail, and the library dropped charges after Goldman's family promised to pay the $127.86 she owed for the items, according to the January 14 *Miami Herald*.[75]

FILTERING SOFTWARE

Filters are much maligned because of their reputation for supposedly blocking innocent sites, particularly AIDS sites, gay sites, and breast-cancer sites. Yet the evidence suggests that the number of sites blocked accidentally by filters is extremely small. Several reports by the group Censorware Project each revealed only a few dozen or hundred wrongly blocked sites, out of millions of individual web sites.[76] A 1998 survey of twenty-four public library administrators who used filters found that public libraries that filter receive only 1.6 complaints per month about wrongly blocked sites.[77] The Memphis Public Library recently installed filtering software, and after several months reported problems were "a nonevent":

> In a report given to the commission's education and libraries committee, [City Librarian Judith] Drescher stated, "Since installation, the library has

received no requests from the public to review and block a site. Library staff has submitted five sites for review, all of which were blocked."[78]

Until now, there had been no actual data gathered from filters in public libraries and analyzed to examine the nature of web sites blocked from library patrons.

The data obtained from the Tacoma, Washington, Public Library and the Public Library of Cincinnati and Hamilton County support the other evidence gathered by the Censorware Project and Filtering Facts in the conclusion that the amount of innocent speech being blocked is indeed extremely small. (See Appendix A.) In Tacoma, 1,853 web-page accesses were inappropriately blocked out of 2,510,460 web pages accessed, or 0.07 percent. In Cincinnati, only 1485 files were inappropriately blocked out of 14,376,211 total files accessed, about 0.01 percent. Clearly, all the evidence to date indicates that the problem of filters blocking legitimate information is indeed extremely small.

Opponents of filtering sometimes argue that children using filtered Internet access will be at a competitive disadvantage because they will be denied crucial information. Children will become pregnant and catch venereal diseases because they were denied sexual education information. Gay teenagers will commit suicide because they will be unable to reach out to fellow gay teens on the Internet. Yet millions of children are required to use filters in public school settings, and there is not one confirmed instance that any of these things have happened.[79] Of all the millions of children who rely on filtered Internet access in the home and in school, no child has committed suicide, become pregnant, contracted a disease, flunked a class,

or even gotten a bad grade on a paper because they were required to use a filter. There is not one shred of evidence to suggest that any person has ever been meaningfully harmed in any way by being required to use filters.

All of these imaginary problems are in contrast to the many real, well documented incidents of real harm being inflicted on children by unfiltered Internet access in public libraries. Children are being accosted with porn, propositioned by pedophiles, and having their innocence stripped away even further in an already too grown up world. The failure of librarians to control these problems supports the appropriateness of laws requiring filtering software.

APPENDIX A

LIBRARY LOG ANALYSES

TACOMA PUBLIC LIBRARY

The Tacoma, Washington, Public Library supplied one-year's worth of blocked and unresolved web site accesses in 1,020 printed pages covering the period of July 1, 1998, through June 30, 1999. Analysis revealed 1,764 individual users sessions where patrons accessed commercial pornography sites. Patrons accessed 22,364 partially blocked websites, which accounted for .9 percent of all web pages. Nonsexual sites and *DejaNews*, a mega-site with a significant amount of pornographic content, being blocked accounted for 0.07 percent. In other words, 99.93 percent of the time the filter functioned properly.

Data Supplied by the Tacoma Public Library. The Tacoma Public Library has an unusual form of filtering. All access is screened by the filter, Cyber Patrol. But rather than placing a message on the screen saying "blocked by Cyber Patrol," the library has a customized web browser that launches a text-only browser when a blocked website is encountered, to allow the viewer to read the text.

A sample entry in the Tacoma log looks like this: IC102 1999/06/15 15:51:51 16:11:54 PID BLOCKED. The first number, IC102 represents the workstation number. The second represents the date, the third the time that the logged session began "15:51:51," the fourth the time of the blocked access, "16:11:54," the message BLOCKED, and finally, the address of the website.

This information was used to determine the number of blocked sites, the number of separate incidents of accessing pornography, and the content of the blocked sites.

Number of Separate Incidents. Each page of the log files was scanned to identify separate incidents of patrons viewing pornography. A "separate incident" was defined as a unique user session from a unique station number, separated by at least two hours from any previous incident on the same workstation. Only commercial pornography sites were examined, so this left out hundreds of sexually related web sites that were not commercial pornography sites. There were a total of 1,764 of these incidents, compared to eight incidents for which there was written documentation, meaning that for every documented incident in Tacoma, more than two hundred went unreported.

Number of Blocked Web Sites. The number of blocked web sites was determined by taking a random sample of ten pages from each month of logs, for a total of 120 pages out of 1,020 or 11.76 percent. Based on the sample, 22,364 web pages were blocked during the year out of 2,510,460 total web pages accessed, or 0.9 percent.

Content of Blocked Web Sites. The bulk of the blocked sites were outright commercial pornography sites, and sexually explicit sites either not selling anything or featuring simple nudity or explicit sexual discussions. The nonsexual sites were composed mostly of one web site, *www.dejanews.com*. The blocking of *DejaNews*, a complete archive of Usenet posting has been controversial. The makers of Cyber Patrol claim they must block the entire site in order to block the numerous and explicit sexual discussion groups where pornographic pictures are exchanged. Apparently the library thought it too valuable a resource to completely block, as it disappears from the block logs in October, when the library apparently unblocked it.

	Commercial Pornography Sites	Sexually Explicit Sites	Dead Links	Nonsexual Sites and *DejaNews*
Number	12,385	6,180	1,947	1,853
Percent	55	28	9	8

CINCINNATI/HAMILTON COUNTY PUBLIC LIBRARY

The Public Library of Cincinnati and Hamilton County, Ohio, supplied fifty-two days' worth of computer server logs that recorded attempts to access web

sites blocked by the filter, "Bess." From July 27, 1999, to September 16, 1999, the logs recorded patrons attempting to access files, including images, from blocked web sites 76,570 times in at least 5,055 separate incidents.

Analysis of the blocked web sites indicates this represents at least 4,297 separate incidents where patrons attempted to access approximately 14,878 pornographic web pages over fifty-two days. Further analysis of the content of the blocked web sites showed that only 2 percent of the blocked sites were nonsexual in nature, and that this accounted for only 0.01 percent of all web accesses—or that 99.99 percent of the time the filter did not block innocent sites.

Data Supplied by the Cincinnati Library. The library system employs a filtering server computer that centrally handles all Internet requests. The filtering server is called Bess and is supplied by a Seattle company, N2H2. Every day Bess generates a group of summary statistics describing total Internet activity, along with attempts to access blocked sites. The summary includes nineteen different statistics, such as "Search Engine Requests" and "Total Bytes." Five of the nineteen statistics were examined to determine the amount of Internet requests that were blocked by the filter, the content of the requests being blocked, and estimations of how many web pages and individual

sessions this represented. An abbreviated example of a daily server log is shown below:

> **Bess Proxy Server Statistics for Thursday, September 16, 1999**
> Total Requests: 308,870
> HTML Requests: 77,734
> Total Blocked Requests: 849 (0.27 percent)
> Unique Blocked Clients: 115
> **Top Thirty Blocked URLs:**
> (39 / 5 percent) *stats.hitbox.com/buttons/hitbox.com0.gif*
> (28 / 3 percent) *www.cyberlounge.com/dc.gif*
> (21 / 2 percent) *www.partyhouse.com/banners/kara/kasmod2f.gif*
>
> **Top Thirty Blocked Domains:**
> (82 / 10 percent) *stats.hitbox.com*
> (79 / 9 percent) *www.partyhouse.com*
> (38 / 4 percent) *www.xxx500.com*

- *Total Requests* represents the total number of all web-related files, such as html pages, as well as *gif* and *jpg* image files requested by Internet users.
- *HTML Requests* represents the total number of html files, or individual web pages, requested by Internet users. The ratio of *Total Requests* to *HTML Requests* was 3.87.
- *Total Blocked Requests* represents the total of all Internet requests, including images, blocked by the filter. This indicates that *Total Blocked Requests* exaggerates the total number of web pages blocked by 3.87 times.

- *Unique Blocked Clients* represents the number of individual workstations from which Internet requests were blocked. A minimum number of unique user sessions where there were attempts to access blocked files can be drawn from this figure.
- *Top Thirty Blocked URLs* represents the thirty most often blocked Internet files. The majority of these blocked files are *jpg* and *gif* image files. The numbers to the right of the URL of each blocked file, such as *(39 / 5 percent)*, represent the number of times that file was blocked on that day, and the percentage of total blocked files it represents.
- *Top Thirty Blocked Domains* represents the thirty most frequently blocked Internet domains or highest level web site addresses. This information was less useful than *Top Thirty Blocked URLs*, since the files being blocked were sometimes several directory levels down from the top of domain. For example, *Top Thirty Blocked Domains* would report the file www.angelfire.com/in2/exoticbikini/images/nl.gif being blocked as simply *www.angelfire.com*. Therefore, the content of *Top Thirty Blocked URLs* was analyzed rather than *Top Thirty Blocked Domains*.

Summary of the Statistics. Total numbers for four of the statistics for each of the fifty-two days were compiled in a manner displayed in the table on the next page:

Total Requests	HTML Requests	Total Blocked Requests	Percent Blocked	Unique Blocked Clients
14,376,211	3,717,383	76,570	0.53%	5,055

Total Requests were divided by *HTML Requests* to determine the ratio of total requests to actual web pages, 3.87. Applying this ratio to *Total Blocked Requests* indicates that approximately 19,837 actual web pages were blocked during the fifty-two days.

The 5,055 *Unique Blocked Clients* means that on at least 5,055 separate occasions users were blocked from accessing files. This almost certainly understates the number of separate occasions, since there were likely multiple incidents from the same workstation on the same day.

Each of the 1,500 URLs supplied in the *Top Thirty Blocked URLs* were analyzed for content. The total number of occurrences of blocked URLs that could be identified through the *Top Thirty Blocked URLs* statistic was 35,701. This represents 47 percent of the 76,570 *Total Blocked Requests*, and there is no reason to assume that this does not reasonably reflect the content of all blocked accesses. The number of times each URL was blocked was added to determine the totals for each content area. Some URLs were blocked

hundreds of times. The complete data is contained in this table:

	Commercial Pornography Sites	Sexual Sites	Dead Links	Undetermined	Nonsexual Sites	Total
Number	26,695	3,381	2,254	2,639	732	35,701
Percent	76	9	6	7	2	100

Analysis of Blocked Websites

Content of Blocked Web Sites. Every URL listed in the *Top Thirty Blocked URLs* statistic was checked for content. There were 1,500 separate entries, although a number of the URLs were listed multiple times. Each URL was examined, along with the main domain home page and the immediate directory web pages. For example, *www.partyhouse.com/banners/kara/kasmod2f.gif* was examined, along with the main

domain home page, *www.partyhouse.com*, and the immediate directory web pages in *www.partyhouse.com/banners/kara*. A determination was made as to which category the blocked portion of the web site belonged.

Commercial Pornography Sites were sites that: 1) featured "Adults Only" type warnings somewhere on the site, and 2) were engaged in selling pornographic photographs, text, or chat rooms. Examples of this type of site were *xx.fsn.net*, "The Fetish Sex Network," and *www.slut-o-rama.com*.

Sexual Sites were either non-commercial pornography sites, sites that depicted nudity in a casual or artistic way, or sites that featured explicit sexual discussions. Examples of this type of site were *energy4life.com* and *www.chocolatebikini.com* both of which featured mild nudity.

Undeterminable URLs were portions of sites that served images or banners to meta-sites, and the directory or sub-page where the image was serving was notdeterminable. The majority of these URLs were from the meta-site *www.geocities.com*, which features thousands of individual user home pages, and serves these sites with image files such as *www.geocities.com/toto?s=19190030*.

Dead Links were sites or relevant portions of sites that returned a "not found" or "error" message.

Nonsexual Sites were sites that had no explicit sexual content at all. This included sites such as *www.dylanology.com*, a site devoted to Bob Dylan and *www.defendoor.com*, a door security product.

Number of Incidents. Because the logs do not link each access with an individual workstation, it is not possible to precisely determine how may separate incidents occurred. However, Bess records the *Unique Blocked Clients* statistic for the number of individual workstations where a blocked attempt occurred. The total number of *Unique Blocked Clients* for the fifty-two days was 5,055. Assuming that at least 85 percent of blocks were sexual or from commercial pornography sites, this translates into an estimate of at least 4,297 separate incidents where patrons attempted to access pornography. Since more than one session involving an attempt to access a blocked site almost certainly occurred on the same workstations, this number understates the total number of incidents.

Conclusions. The sample of 47 percent of all blocked URLs analyzed revealed only 732 times where a patron encountered a wrongly blocked site. This would translate into about 1,485 wrongly blocked accesses out of 14,376,211 total accesses, about 0.01 percent. What this means is that 99.99 percent of the time the filter blocked no innocent sites, and that the chance of a patron encountering a wrongly blocked site is about one in ten thousand.

Patrons at the Public Library of Cincinnati and Hamilton County made significant attempts to access hard-core pornography and obscenity through the Internet. While 0.53 percent of all web accesses may not sound significant, this translates into thousands of separate incidents in only a two month period, many of which very likely involved the illegal transmission of obscenity.

The fact that during the testing the library had complete filtering on all terminals and no privacy screens certainly decreased attempts to access pornographic web sites. It is worth noting that another large urban library system in the Midwest, the Chicago Public Library, performed a similar test during a similar period, the summer of 1999. The Chicago Public Library has unfiltered access and privacy screens, and its logs show 5 percent of access to be pornographic, or ten times the levels recorded by the Cincinnati library.

On December 12, 1999, the Public Library of Cincinnati and Hamilton County changed its policy to allow adults to have unfiltered Internet access at workstations that employ privacy screens. One of the sites patrons attempted to access hundreds of times was *http://soiroom.hyperchat.com/rapfan*, a "Rape Fantasy" chat room. On one day alone, August 8, 1999, there were 225 separate attempts to access this site. The most likely conclusion is that all 225 attempts were made by a lone individual compulsively trying to reach the "Rape Fantasies" chat room. Assuming this individual is an adult, he is now free to use the Cincinnati library to act out his "Rape Fantasies."

DAYTON/MONTGOMERY COUNTY PUBLIC LIBRARY

The Dayton and Montgomery County Public Library supplied seventeen months worth of computer server log daily summaries that recorded attempts to access web sites blocked by the filter Bess. A total of 342 days worth of log summaries were usable. From June 4, 1998, to October 24, 1999, the logs recorded

patrons attempting to access files, including images, from blocked web sites 248,589 times in at least 14,358 separate incidents. Adults at the Dayton library have the ability by entering their patron barcodes to override the filter and look at anything they want. Unfortunately, only summary statistics were provided, so the content of the blocked web sites was unavailable for analysis, and there is no log of how often the filter was overridden.

Data Supplied by the Dayton Public Library. The Dayton and Montgomery County Public Library employs a filtering server computer that centrally handles all Internet requests. The filtering server, Bess, is supplied by a Seattle company, N2H2. Only 342 of the daily logs were usable, because many of the daily logs contained only partial information. Every day Bess generates a group of summary statistics describing total Internet activity, along with attempts to access blocked sites. The summary includes nineteen different statistics, such as "Search Engine Requests" and "Total Bytes." Five of the statistics were examined to determine the amount of Internet requests that were blocked by the filter and estimations of how many web pages and individual sessions this represented. An abbreviated example of a daily server log is shown below:

Date	Total Request	HTML Request	Total Blocked Requests
1-Jun-98	157,185	40,294	333

Percent Blocked Requests	Unique Blocked URLs	Unique Blocked Clients
0.0021	189	41

- *Total Requests* represents the total number of all web-related files, such as html pages, as well as *gif* and *jpg* image files requested by Internet users.

- *HTML Requests* represents the total number of html files, or individual web pages, requested by Internet users. The ratio of *Total Requests* to *HTML Requests* was 3.99.

- *Total Blocked Requests* represents the total of all Internet requests, including images, blocked by the filter. This indicates that *Total Blocked Requests* exaggerates the total number of web pages blocked by approximately 3.99 times.

- *Unique Blocked Clients* represents the number of individual workstations from which Internet requests were blocked. A minimum number of unique user sessions where there were attempts to access blocked files can be drawn from this figure.

Summary of the Statistics. Total numbers for four of the five statistics for the 342 days are shows below:

Total Requests	HTML Requests	Total Blocked Requests	Percent Blocked	Unique Blocked Clients
69,032,300	17,289,865	248,589	0.36%	14,358

Total Requests were divided by *HTML requests* to determine the ratio of total requests to actual web pages, 3.99. Applying this ratio to *Total Blocked Requests* indicates that approximately 62,303 actual *web pages* were blocked during the 342-day period.

The 14,358 *Unique Blocked Clients* means that on *at least* 14,358 separate occasions users were blocked from accessing files. This almost certainly understates the number of separate occasions, since there were likely multiple incidents from the same workstation on the same day.

Number of Incidents. Because the logs do not link each access with an individual workstation, it is not possible to determine precisely how may separate incidents occur. However, Bess records *the Unique Blocked Clients* statistic for the number of individual workstations where a blocked attempt occurred. The total number of *Unique Blocked Clients* for the 342 days was 14,358. Since more than one session involving an attempt to access a blocked site almost certainly occurred on the same workstations, this number understates the total number of incidents.

* * * * *

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[D. Ex. 22A]
[Tacoma Public Library Incident Log Sample]

Exhibit 22A consists of blocked URL printouts and will be submitted in a separate lodging.

[D. Ex. 23B]

Exhibit 23B consists of web page screen shots that have been omitted and will be submitted in a separate lodging.

[D. Ex. 30]
[Tacoma Public Library Collection Development Policy (without appendices)]

#10.01
May 1982

TACOMA PUBLIC LIBRARY

Administrative Policy #10.01
Acquisition Policy

Formally Adopted by Board of Trustees on September 18, 1979

Outline

A. General Policy Statement
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Appendices:

Appendix 1 - Freedom to Read Statement
Appendix 2 - Library Bill of Rights
Appendix 3 - Community Descriptors - A List of Sources
Appendix 4 - Freedom to View - Adopted by Board of Trustees February 17, 1981

A. General Policy Statement

The Tacoma Public Library, an agency of the City of Tacoma, operating according to the Public Library Laws of the State of Washington under the management and control of its Board of Trustees, affirms the following objectives for the selection of materials.

To select, assemble, and make available to the public informational, educational, and recreational materials; to preserve materials which possess historic interest or worth; to assist in the development of an enlightened citizenry; to encourage self-education; and to promote and provide materials necessary for an enriched personal life. Tacoma Public Library makes its materials available for the purposes named above to all persons re-

gardless of their age, sex, religion, race, origin, political views, social or economic status.

B. Intellectual Freedom

The Library subscribes fully to the American Library Association's Freedom to Read Statement (Appendix 1) and the Library Bill of Rights (Appendix 2).

C. Responsibility for Selection

Ultimate responsibility for selection of materials rests with the Library Director, operating within policies determined by the Library's Board of Trustees. The Director delegates the responsibility for selection of library materials to members of the staff.

D. Policy by Clientele

1. Adult

Adults who use the collection of materials at Tacoma Public Library are defined in age as being over 14 years old. They are men and women of all races and beliefs with widely differing tastes and needs. Materials selected for this diverse group of people include those of a recreational nature and cover the widest possible range of interests and reading levels.

2. Young Adults

Young adults (generally aged 12 through 18) will have materials specially selected to meet the particular recreational, emotional and informational concerns of this age group and will also be served from the general collection. Those materials which will help young adults

understand themselves and others, broaden their viewpoints and knowledge of the world, stimulate their curiosity, expend their reading ability and enjoyment, and guide them in the transition from children's materials to adult materials are preferred.

3. Children

Children (generally preschool through age 12) are recognized as creative, inquiring individuals with unique capacities for intellectual and emotional growth. Materials are chosen to meet their diverse interests and needs but the resources of the entire Library are accessible to them. Materials for children are selected with the realization that they are an integral part of the total Library collection and are judged by the same criteria which apply to adult materials.

4. Disabled

The individuals in this group are not able to utilize materials published in the usual format. This inability is coupled with an interest in becoming an aware and informed person and in finding sources of educational and recreational materials. The library will meet the information needs of the group to the fullest extent possible, within budgetary constraints, and will refer individuals to other agencies equipped to meet a specialized need.

E. Policy by Collection Type

1. General Collection

a. Fiction

Novels will be purchased for the following purposes:

1) To satisfy the need for recreational reading materials for persons of differing tastes, interests, purposes and reading skills.

2) To serve as educational tools and to enrich human understanding by dealing informatively with social, personal, racial, ethnic, or religious situations.

Since it is not possible to set up a standard of literary quality which will apply to all novels, the Library uses the following considerations as a guide when selecting fiction:

1) Is the novel competently written?

2) Does the novel has constructive and plausible characterizations?

3) Does the novel give an honest portrayal of the human experiences with which it deals"

4) Does the book contribute to the collection balance in regard to (a) types and styles of literature, (b) subjects treated, and (c) patron appeal?

Other selection considerations are:

5) A collection of standard and classic novels will be maintained as determined by long standing community needs and/or listing in an authoritative bibliography.

6) A collection of mysteries, science fiction, westerns and light romances will be maintained.

7) Experimental novels, while often controversial, will be considered for purchase as they reflect new trends, and styles of expression.

8) Books written about the Pacific Northwest or with the Pacific Northwest as a setting will be especially considered for purchase.

9) Books written obviously and exclusively for sensational or pornographic purposes will not be chosen, but the Library will not exclude a title because of objectionable language or vivid description of sex or violence if the author is dealing honestly and realistically with his/her theme. The Library recognizes that any given title may offend some persons; however, selections will not be made on the basis of any anticipated approval or disapproval; but solely on the merits of the work in relation to the collection, the Library's objectives, and the interest of the readers.

b. Non Fiction

The selection of circulating adult nonfiction materials will reflect the current needs, interests, and activities of the adult borrower. In addition to the materials selected which have been demonstrated to be of practical value to many adults, the Library will also select materials of a more specialized technical nature which experience has shown are required to meet the informational needs of some adult borrowers. Materials of a lighter vein are provided for entertainment purposes. This collection will contain materials of a wide variety of topics, levels of sophistication and treatment reflecting the needs and interests of the adult who uses the Tacoma Public Library.

Although the branch libraries are expected to maintain sufficient circulating materials of interest and use to their patrons, the Main Library will endeavor to act as a backup source of the entire system. To fulfill this function, the Main Library will select materials of sufficient quantity, variety and of a more specialized nature to supplement the branch collections.

Other criteria for the selection of nonfiction may include the following:

1) Purpose of item

2) Audience for whom intended
3) Reputation of the author
4) Quality of writing and visual art presented
5) Indexed in Library-owned materials
6) Insufficient material in subject area
7) Popular demand
8) Reputation of the publisher
9) Format of the material, its durability and quality of production
10) Accuracy of information presented
11) Special features in the book: Plates, Indexes, Tables, etc.
12) Not available elsewhere in the community
13) Price
14) Reviews in selection aids
15) Timelines

2. Foreign Language Collection

The aim of the Foreign Language Collection is to provide recreational and informational reading for the foreign-speaking population of the city and to make available materials to those learning a foreign language. Books selected for the Foreign Language Collection may include:

a. Classics in the original language
b. Works of significant authors, past and present

c. American classics and translations of books about American culture, literature and history
d. Materials on the history, culture and literature of the countries in which the language is spoken

3. Children's Collection

a. Primary emphasis is placed on the selection of diverse materials for all children of the community (generally preschool through age 12) which will:
    1) Make them aware of the pleasures and knowledge to be derived from the use of Library materials.
    2) Provide knowledge of mankind's history and culture.
    3) Provide materials which will assist in the development of reading skills.
b. The criteria stated in the adult selection policy apply to the selection of children's materials. These additional policies apply;
    1) Subject, vocabulary, and format must be understandable to the children for whom the material is intended.
    2) Materials which do not meet literary or production standards may be chosen to fulfill emotional needs, serve as an incentive to read or serve some other special purpose.

3) Books in series are evaluated on the individual merits of each title.

c. Duplication of titles is provided to meet demand. Adult and young adult materials may be duplicated.

d. Librarians may offer assistance, but parents or legal guardians are responsible for guiding their children in the selection of library materials.

4. Reference Collection

a. A collection of reference materials is maintained for patron and library staff use within the library. The Reference Collections will contain (but are not limited to) the following types of materials:

1) Encyclopedias, both general and specialized.

2) Handbooks and dictionaries in all the major fields of knowledge

3) Directories of people, institutions, firms and/or official bodies in all fields

4) Atlases and gazetteers

5) Statistical compendia

6) Indexes and abstracts covering both material already owned or being acquired and material not owned but available elsewhere

7) Bibliographies: National, book trade and subject

8) Biographical dictionaries of general, national or regional, professional or occupational types, with both retrospective and current coverage

9) Articles clipped from newspapers and periodicals

b. Reference materials are selected according to the same general criteria as non-fiction materials.

5. Non-Print Collection

The Library buys non-print materials in many different formats. These materials must meet the same general selection criteria as print materials with special consideration given to technical quality. In addition, each class of materials must demonstrate an appropriate use of its format. For example, slides should present information that is inherently visual in nature without needing motion to convey its message. Films should use the qualities of visual image, motion and sound in creative and informative or entertaining manner. The Library only buys non-print materials designed for school curriculum use when such materials are of interest to the general public.

Because of the special nature of non-print materials, the Library makes every effort to make appropriate equipment for their use available to the public. In cases where equipment cannot be made available for home use, it will be made available for in-Library use. Selection of equipment is based on durability, ease of operation, quality of performance,

portability, ease of maintenance and repair, reputation of manufacturer, and cost.

6. Periodicals

   a. Tacoma Public Library selects for purchase, or accepts as gifts, omit periodicals which support the recreational, informational, educational, professional and research needs of the total community. It strives to acquire those titles which will:

      1) Reflect current thinking
      2) Supplement the book collection
      3) Supply recreational reading
      4) Serve the staff as selection aids and as professional reading materials.
      5) Add to current historical or regional information

   b. Individual titles may be chosen for the following reasons:

      1) Accuracy and objectivity
      2) Accessibility of content through indexes
      3) Demand
      4) Need in reference work
      5) Representation of a point of view needed in the collection
      6) Local interest in subject matter
      7) Price
      8) Favorable reviews

7. Federal, State and Local Documents Collection

   Tacoma Public Library is a selective depository for the United States Government materials and a full depository for Washington State documents. The Library is subject to federal and state regulations which apply to depository libraries.

   Selection of items to be received from the Federal Government follows the same general principles as those for all other materials except that when possible, highly technical publications and agency publications intended for the originating agency's in-house use are not selected.

   Tacoma and Pierce County documents are of particular significance and are solicited. Documents from other governmental agencies may be collected.

   Duplicates of items of particular significance are solicited and provided to branches and, when appropriate, are distributed free of charge to the public.

8. Pamphlet Collection

   Pamphlets are solicited or purchased because they provide useful, current information at a low cost. Tacoma Public Library maintains a Pamphlet Collection to supplement the general collection.

9. Special Collections

Materials of special interest may be purchased or solicited. Special collections of the Library include:

a. Tacoma City Archives

By resolution of the Tacoma City Council, the Tacoma Public Library has been designed as the archives for "historic city documents." This status has also been recognized by the Washington State Archives in that items judged by the State Archivist as being "archival" or "potentially archival" are transferred to the jurisdiction of the Tacoma Public Library by units of the government of the City of Tacoma.

b. Lincoln Collection

The Lincoln Collection of the Tacoma Public Library is based on the Library of Marion L. Saunders, which was purchased in 1948. To this collection has been added a number of federal documents and other items about the life and times of the sixteenth president.

c. Kaiser Collection

A collection of books, maps, posters, and pamphlets on World War I is named in honor of John B. Kaiser, director of the Library from 1914 to 1924.

d. Genealogy Collection

This collection contains items of genealogical interest and local history. The collection also includes depository items from the Tacoma Genealogical Society.

e. Northwest Collection

The Northwest Collection includes books, maps, manuscript materials, photographs and other items about the history, growth, and development of that portion of North America west of the Rocky Mountains and north of California, including Alaska.

10. Branch Collections

Branch Collections contain primarily circulating materials which are supplemented by more specialized materials available from the Main Library. Branch Collections contain limited reference materials, adequate to answer most questions.

F. Policy by Format

The Library will purchase materials in any appropriate print or non-print format which may include:

1. Hardback
2. Paperback
3. Softcover
4. Large Print
5. Microform
6. Videoform

G. Maintenance of Collection

1. Weeding and Discarding

   In order to maintain a collection of value and use to the community, the following materials will be discarded: Library materials which have become worn out through use; materials that are no longer timely or accurate; materials that are of little use or questionable value; and excess copies of titles no longer in demand. All discarded materials are sold through a bid process.

2. Binding and Mending

   Library materials needing repair will be mended if it is not possible to replace them or if the replacement cost is prohibitive. Library materials needing repair which are available for purchase will be evaluated according to the Library's need. They will either be discarded, used as they are, or replaced. Unless irreplaceable and distinctively worthwhile, paperbacks will not be mended except for the repair of separated covers.

3. Replacement and Duplication

   Materials withdrawn will not automatically be replaced. The Library will purchase multiple copies of titles when a high rate of use is anticipated. Purchase in one collection type or format does not preclude its purchase in another type or format.

H. Gifts

The Library accepts gifts with the understanding that the material will be judged by the same standards of selection as those applied to the purchase of new materials. Those items which are useful to the Library will be retained. Unaccepted materials will be discarded.

The Library reserves the right to interfile gifts with other materials on the subject for the best public service.

The appraisal of a gift to the Library for tax purposes is left to the donor. The Library may provide a receipt indicating the number and type of items donated.

Funds for the purchase of a gift or memorial materials are encouraged. The responsibility for selection rests with the Library staff, although the donor's suggestions will be considered. Bookplates will be placed in each item if requested by the donor.

[D. Ex. 33]

[Tacoma Public Library Internet Use Policy]

Tacoma Public Library

Administrative Policy #10.53

Policy For Public Use of the Internet

Policy Statement

The Mission Statement of the Tacoma Public Library emphasizes sensitivity to community changes and needs, and commits the Library to the delivery of excellent services:

The mission of the Tacoma Public Library is to provide the highest quality public library services to fulfill the informational, educational, recreational and cultural needs of the citizens in the dynamic and changing community of Tacoma, which is comprised of many ethnic and economic backgrounds, and, further, to recognize changes that occur in society and to adapt these changes to the delivery of people-oriented library services.

To fulfill its mission, the Library has earned a reputation for adopting new information technologies into its information services program. The Library views the Internet, a vast and interconnected network of information providers, as an information technology with the potential to expand the universe of information available to the people of Tacoma far beyond the reach of the Library's own collection. Furthermore, the Library believes that it is essential that the Internet information resources be integrated with the other information systems of the Library. The Library also recognizes that the very nature of the Internet is evolving rapidly and, therefore, the Board of Trustees

of the Tacoma Public Library intends this policy to be updated and amended from time to time as may be necessary.

1. Responsibility of Users

The Internet is global in scope, with a highly diverse user population and information content. The Internet is an unregulated medium and the Tacoma Public Library has no control over any part of the Internet beyond its own homepages. Because the Library is not able to exercise the same selection criteria to Internet resources that it applies to materials held in its collections, the Library may provide hardware and software mechanisms to restrict access to specific sources determined by Library staff to be inconsistent with its mission and collection development policies. Some information content on the Internet may be offensive to some people and some content may be illegal, out-of-date, or erroneous. It is the responsibility of the user, therefore, to determine what materials are appropriate and suitable for his or her use.

Parents may be concerned about the use of Internet Information services by their children. The Library affirms the right and responsibility of parents to supervise their children's use of library resources, including Internet services. The Library will make available to parents upon request such publications as "Child Safety on the Information Superhighway" as a guide to children using the Internet.

The library also recognizes that parental control and guidance cannot always be provided with regard to unintended viewing of images displayed in public places; that data collected and analyzed by the Library

evidences the potential for considerable and pervasive intended and unintended display of sexually explicit images at Internet terminals in the Tacoma Public Library; that the Library has a compelling interest in preventing the display of sexually explicit images in view of children at the public Library; that the use of partitions and other devices to shield Internet terminals will only reduce the filed of view while still allowing the open public display of sexually explicit images; that limited filtering will be more effective in preventing public display of such images in the library; that the use of the library internet terminals without implementation of a filtering policy will carry with it a significant danger of exposure of children to such sexually explicit images. The Library, therefore, has implemented hardware and software mechanisms to restrict access to specific sexually explicit images, which hardware and software are designed to minimally intrude upon the rights of persons to exercise their constitutionally protected right to disseminate and receive speech.

By making use of Internet services at the Tacoma Public Library, patrons agree to abide by the provisions of this "Policy for Public Use of the Internet."

2. Levels of Service

A. In-Library Public Use

Access to a variety of Internet services, including Gopher, the World Wide Web, and connections to the catalogs of other libraries, is presently provided at selected terminals within the Library as a supplement to the Library Catalog and the other electronic information resources of the Library. The Library may

offer other Internet services as deemed appropriate by the Library. Such additional services must meet the informational and service goals of the Library and it must be technically feasible to offer such services in a secure and cost-effective manner. The Library will not offer chat, electronic mail or gaming. At the beginning of each Internet session, the user will indicate assent to a "Conditions of Use" statement which appears on the screen and which is reproduced below.

"Conditions of Use"

(This "Conditions of Use" statement will be shown on the screen when user logs on to selected Internet services. Acceptance of the conditions will be indicated when the user clicks the "I agree" button.)

The Internet is global in scope with a highly diverse user population and information content. The Tacoma Public Library has no control over any part of the Internet beyond its own homepages and is not able to exercise the same selection criteria to Internet resources that it applies to materials held in its collections. Some information content on the Internet may be offensive to some people and some content may be illegal, out-of-date, or erroneous. It is the responsibility of the user, therefore, to determine what material is appropriate and suitable for his or her use.

Parents may be concerned about the use of Internet information services by their children. The Library affirms the right and responsibility of parents to supervise their children's use of library resources, including Internet services. The Library will make available to parents upon request such publications as "Child Safety

on the Information Superhighway" as a guide to children using the Internet.

By using Internet services through the Tacoma Public Library, users agree that the Library will not be responsible

1) for any indirect, consequential, special, or punitive damages or losses which may arise in their use of the Internet, and

2) for the accuracy, appropriateness, or suitability of any materials or information retrieved, displayed, or printed.

Users of Library Internet services should have no expectation of privacy while using the Internet. The Library reserves the right to refuse to post or to remove any information or materials, in whole or in part, that, in its sole discretion, are unacceptable or in violation of its policies. Electronic mail, chat and gaming are not authorized uses.

Use of the Internet through the Library shall be governed by and in accordance with applicable laws and regulations and with the rules and policies of the Tacoma Public Library. All users of the Internet are required to have a valid Tacoma Public Library card.

By using Internet services through the Library, users agree to abide by the "Policy for Public Use of the Internet" Policy #10.53, adopted by the Tacoma Public Library Board of Trustees. Copies of this Policy are available upon request.

B. Dial-In Public Use

The Library may make available through a free dial-in service a variety of electronic information resources, including the Library Catalog and selected Internet services. Some dial-in services may or may not be available during hours when the Library is open due to licensing restrictions. Other licensing restrictions on particular services may require the user to have a valid Tacoma Public Library card and personal identification number (PIN). Dial-in access to Internet services will, as determined by the Board of Trustees of the Tacoma Public Library, require a valid Tacoma Public Library card. Dial-in users of selected Internet services will be presented with the Conditions of Users statement shown above. An individual is responsible for all use made of library card or PIN.

3. General Provisions

The Library may from time to time adopt regulations setting time limits on any of its workstations and dial-in ports in order to maximize the efficient and effective use of the Internet and other Library information resources.

Transaction logs and other system information that could be used to identify users with specific materials or subject matter are considered by the Library to be confidential, as provided for by Administration Policy 10.23, "**Confidentiality of Records Policy**."

The Library reserves the right to apply hardware and software control mechanisms to ensure that information provided through its Internet services is consistent with its mission and collection development

policies. The Library's acquisition of Internet materials to be made available to Library patrons does not include graphic materials depicting full nudity and sexual acts which are portrayed obviously and exclusively for sensational or pornographic purposes.

The Internet terminals and software must be used as installed. Any person tampering with Library software to support Internet access beyond those services and software supplied by the Library, or in any other way adding to, modifying, or removing any system software or hardware, may have his or her use of Internet services limited or suspended, and may be banned from the Library, as provided for by Board Policy #10.49, "Exclusion from Library Premises."

A user may not use the computing resources of the Tacoma Public Library for any illegal or unauthorized act or in violation of any library rule or policy or of any local, state, or federal laws or regulations.

Library computing resources are to be shared among users. Therefore, an individual user or group of users may not engage in any behavior that unreasonably interferes with or disrupts the use of computing resources by others. Disruptions include, but are not limited to: distribution of unsolicited advertising; propagation of computer viruses, worms, or other computer programs that have the potential of damaging or destroying programs or data; harassment of other persons; and using computer resources to make unauthorized entry to any computer accessible via the network, including the host systems at the Tacoma Public Library.

Each network that a user connects to has its own set of policies and procedures. Actions which might be allowed on one network may be controlled or forbidden on another. It is the user's responsibility to abide by the policies and procedures of these other networks.

When downloading software, files or data, it is the user's responsibility to check for copyright protection or any licensing agreement and to comply with the requirements of that copyright or licensing agreement.

[D. Ex. 68-69]
[Westerville Public Library Internet Use Policy]

Exhibits 68-69 constitute a brochure that has been omitted and will be submitted in a separate lodging.

[D. Ex. 83]
[Fulton County Public Library Internet Filter Settings]

Exhibit 83 is a screen shot that has been omitted and will be submitted in a separate lodging.

[D. Ex. 92]
[Memphis-Shelby Public Library Internet Use Policy]

MEMPHIS . SHELBY COUNTY PUBLIC LIBRARY & INFORMATION CENTER

About the Library

[Up]

Library Internet Use Policy

The Library provides access to Internet World Wide Web content in accordance with our mission of satisfying our customer's need to know.

The Library's official web site the Library Web provides customers with links to basic information on the World Wide Web that has been indexed, reviewed, and recommended by staff. In addition the Library allows customers to connect to other network resources outside the Library.

The Library assumes no responsibility or liability for any such content. Customers are encouraged to exercise discretion while using the World Wide Web content. Parents and children are encouraged to learn more about child safety on the Internet from the **Kid's Web** page on the Library Web. As with all library materials, restriction of a child's access to the Internet is the responsibility of the parent/legal guardian.

The Library employs filtering technology to reduce the possibility that customers may encounter objectionable content in the form of depictions of full nudity and sexual acts.

Customers who encounter objectionable content may request a block for that content using the online Customer Request for Reconsideration of Library Materials or World Wide Web Resources Form or the printed version available in each library.

Customers who are prevented by the filtering technology from access to content which they believe is not objectionable may request that the block be removed using the online Customer Request for Purchase of Library Materials or Access to World Wide Web resources Form or the printed version available in each library.

[Footer Omitted]

[D. Ex. 99]
[Tulsa Public Library Internet Use Policy]

[Heading Omitted]
Internet Usage Policy and Guidelines

Click here for more Safety Tips to Cyberspace for Parents and Kids.

POLICY

The mission of the Tulsa City-County Library is to provide informational, educational, cultural, and recreational materials, services, and programs to the people of all ages in Tulsa County. In addition to the use of print resources, the Library also offers electronic access to information from throughout the world. The World Wide Web via the Internet is an important tool in accomplishing this mission.

TCCL is not responsible for the content, accuracy, or availability of an external Internet sites. The accuracy and currency of the information is the responsibility of the originating organization. This global electronic network may contain materials which are out-of-date, illegal, controversial or offensive to individuals. We strongly recommend that parents supervise their child's Internet sessions and let them know if there are materials which they should not access.

All internet resources accessible through the Library are provided equally to all library users. It is the responsibility of the user to respect copyright laws and licensing agreements, and to assume responsibility for payment for any fee-based service.

Acceptable use includes respect for the privacy of other uses and maintaining the integrity of the computer system.

Unacceptable use includes using the Internet for any illegal purpose, transmitting obscene or threatening material, and using the system in a manner that precludes or hampers its use by others. Failure to abide by these policies will result in the loss of Internet privileges.

The first 5 pages printed are free, every additional page is 10 cents per page. Users may download to disks. The Library had disks for sale at $1 per disk.

GUIDELINES

- Staff will gladly assist Internet users but cannot provide extensive instruction. Free workshops are available at some libraries on a regular basis.
- Users should notify library staff if they encounter any problems with the computer or programs.
- Internet computers may not be used to gain access to unauthorized networks or computer systems, for illegal or criminal activity, including slander, libel and the transmission or display of pornography. Tulsa City-County Library uses a screening software called BESS. It blocks access to pornographic, sex, tasteless/gross, and nudity sites. BESS allows the library to open or block individual sites. Library customers may request changes in access to specific sites. See a librarian for details.
- Library customers should not attempt to damage computer hardware or software, alter software configurations, or violate copyright laws and software licensing agreements. Failure to use the Internet computers appropriately or responsibly, as defined in the guidelines, will result in the loss of Internet privileges.

- Customers must have a valid Tulsa City-County Library card to use the Library Internet computers. There is a daily time limit for using the computers.

[D. Ex. 114]
[Greenville Public Library Collection Development Policy]

Collection Development Policy
Approved by the Board of Trustees
May 24, 1999

GREENVILLE (S.C.) COUNTY LIBRARY

COLLECTION DEVELOPMENT

COLLECTION DEVELOPMENT POLICY

MISSION

The Library's collection is established to serve the needs of Greenville County Library users. Collection development at the Greenville County Library is aimed at the general public. The Greenville County Library is committed to providing materials for business information, educational support, cultural enrichment, and recreation for the wide variety of needs and interests in this community. It is the Library's responsibility to acquire quality material presenting all points of view on current and historical issues. The Library will neither promote nor censor any particular religious, moral, philosophical or political conviction or opinion. Material will not be excluded because of the race or nationality of the author, publisher, creator, *etcetera*. In addition, material will not be excluded because of the religious, social, or political views of the author, publisher, creator, *etcetera*. The Library's approach to intellectual openness is not an endorsement of all that is contained within its collection; rather it takes the position that the public interest is best served as the Library fills the role of provider–as opposed to being a determiner–of religious, moral, and political information. This "Collec-

tion Development Policy" supports the mission and goals of the Greenville County Library as established by the Library's Board of Trustees.

AUTHORITY FOR SELECTION

Final authority for the determination of policy in the selection and acquisition of all library books and other material–including all gifts–is vested in the Library's Board of Trustees.

Procedures relating to the purchase and disposal of published books, periodicals, technical pamphlets and other such material by the Greenville County Library, are exempt from the provisions of County Purchasing Ordinance 1510. Procedures for the purchase and disposal of such items must be submitted to the Greenville County Council by the Library Board of Trustees. The current procedures were approved by Greenville County Council on March 4, 1986. See separate document, "Library Materials Disposal Procedures."

RESPONSIBILITY FOR SELECTION

The Board of Trustees of the Greenville County Library determines the Collection Development Policy for the Library. The responsibility for administering this policy rests with the Director of the Library. The actual selection of material is accomplished through the Collection Development Council and other staff members as needed.

SCOPE OF THE COLLECTION

The scope of the Library's book and material collection encompasses the following:

Role of the Main Library: Extensive and in-depth reference and circulating collections are maintained at the Main Library in Greenville.

Role of the Branches: Collections of basic reference works, core collections of circulating books and other material, plus currently popular works, are maintained at the branch libraries.

Special Collections: Based on the services it is expected to perform, the responsibility of the Library is to provide circulating and reference material for the general public. Special collections are maintained only when indicated by the demonstrated needs of the community.

Awareness of Area Resources: The Library maintains an awareness of the purpose and resources of other libraries in the area and avoids needless duplication of their functions and/or material.

SELECTION CRITERIA

Criteria used in the selection process include the following:

1. Each type of material must be considered in terms of its own merit and the audience for whom it was intended. There is no single standard which can be applied in all cases when making an acquisition decision. Some material may be judged primarily in terms of artistic merit, scholarship, or value to humanity; other material is selected to satisfy the informational, recreational, and educational needs of the community. The Library's general policy is to select and acquire books and other material which best satisfy the clientele of the Library within the budgetary limitations imposed by its funding sources. Conscientious effort is made to meet the expressed needs of the community.
2. Some material evaluated may be in widespread or substantial local demand. Items having such demand may or may not meet other criteria contained

in this policy; however, the volume and nature of requests by members of the public will be given serious consideration. Library users' requests for the acquisition of material are encouraged. Selection of requested information is made consistent with the Library's established "Collection Development Policy," availability, cost, demand, and adequate citation.

3. Material will be judged as a whole rather than on isolated passages, illustrations, or other individual elements.

4. The books and other material–including all gifts–acquired by the Library are selected by using the following **specific criteria**, which are listed in no significant order:

   - **Authority of the author/producer** based on education/training, field of specialization, professional reputation, *etcetera*;
   - **Content of the book or item** based on objectivity, accuracy, point of view, authenticity, contribution to the subject area, *etcetera*;
   - **Style** based on clarity, readability, artistic/literary excellence, manner of presentation, *etcetera*;
   - **Format** based on physical condition and quality, ease of storage and maintenance, sturdiness of binding or packaging, quality of printing/recording/filming, size of item, *etcetera*;
   - **Value** based on permanency, currency, educational information, recreational use, historical content, ephemeral nature, special interest, *etcetera*;

   - **Cost of the item** based on whether the item is a good value, is unusually expensive, is too costly for the quality/demand of the item, *etcetera*;
   - **Demand and nature of the demand** based on whether the item is a best seller, is of popular interest, supports educational curricula, is of local interest, *etcetera*;
   - **Scope and audience** based on the potential use of the item, whether the content is appropriate for the intended users (e.g. reading level), *etcetera*;
   - **Evaluations** based on critical reviews in reputable and accepted library review sources, *etcetera*;
   - **Reputation** of the publisher/producer and of the distributor/jobber, *etcetera*;
   - **Quality and quantity** of items already in the collection on the subject, *etcetera*;
   - **Professional judgment** of the Library staff.

5. Material in special formats:

In addition to the selection criteria listed above, the following criteria are used for special formats:

   - **Audiovisual Material** based on:
     Artistic and technical quality of specific format
     Durability of item
     Durability of packaging for specific items
     Quality of abridgment if work is abridged

Authenticity of treatment
Number of audiovisual items in same or related subject areas
Availability of the necessary equipment

- **Electronic Databases and Online Services** based on:
  Accuracy of information
  Initial cost and cost of ongoing updates and maintenance
  User friendliness
  Compatibility with existing library equipment and software
- **New Technologies and Formats** based on:
  Accuracy and timeliness of information
  Initial cost and related expenses
  User friendliness
  Duplication of information and/or service
  Need

SELECTION AND VENDOR RELATIONS

Authority for the selection of sources and/or vendors of material is delegated to the Collection Development Council.

COLLECTION MAINTENANCE

Review and Evaluation: It is the responsibility of the Collection Development Council to work with other Library staff to review and evaluate the existing material of the Library's collection. Periodic and ongoing review of material is necessary in order to maintain an active collection of current interest and usefulness to Library patrons. Library staff members involved in the evaluation of each item for potential withdrawal and/or transfer shall follow the same criteria used for the selection and/or addition of all books and other material.

Transfers: Some material may be transferred within the system, i.e., a reference work is changed to a circulation item or an item is transferred from one agency to another.

Withdrawals: Systematic weeding is an integral part of the selection process which helps maintain the quality of the Library's collection. The same care, thought, and judgment is used in this process as in the original selection. Withdrawal policies are generally applicable throughout the entire collection and are in compliance with local, state and federal laws.

RECONSIDERATION OF LIBRARY MATERIAL

Any Greenville (S.C.) County Library user, by completing the proper form, may request that an item already included in the Library's collection be reviewed to determine if its meets the Library's "Collection Development Policy." Review committees will reevaluate the item and determine if it meets this policy. The decision may be appealed. See separate documents: "Reconsideration of Library Material Procedures," and "Request for The Reconsideration of Library Material."

GIFTS AND DONATIONS

Gifts and donated material are evaluated for inclusion in the collection using the same criteria as that given to material considered for purchase. All material given to the Library becomes the sole property of the Library.

THE FREEDOM TO READ AND THE LIBRARY BILL OF RIGHTS

The role of a public library in a democratic society is to ensure open access to information and material for all as guaranteed by the "First Amendment" of *The Con-*

stitution of The United States. The Library considers the *Freedom To Read* and *The Library Bill of Rights* important tools to help clarify this role, and it considers them to be an integral part of this policy, so long as they do not violate local, state, and federal laws. See separate documents: *The Freedom to Read*, and *The Library Bill of Rights.*

This policy supersedes "The Library Materials Selection Policy," dated July 26, 1993.

This policy became effective on the date of adoption, May 24, 1999.

5-24-99 JS

[D. Ex. 119]
[Greenville Public Library Internet Use Policy]

Greenville County Library System Internet Use Policy

Approved by Board of Trustees on July 17, 2000
Revised August 21, 2000; January 22, 2001;
May 21, 2001; and September 24, 2001

Section 1. Purpose for Providing Internet Use: The Greenville County Library (hereinafter "Library") provides limited access to the Internet in a non-public forum, as a service to our patrons. The Internet is a resource that enables Library patrons to connect to information beyond that contained in the Library's collection. The Library is **not** a commercial Internet service provider. It is the Library's policy to provide Internet access to the public within the limits of available space, equipment, time, personnel, and other resources. The Library cannot guarantee access to the Internet at any given time. The Library is not open to the public for all forms of expressive activity. In offering Internet access, it is not the intent of the Library to create a public forum with respect to the receipt and communication of information through the Internet.

The Library may recommend interesting, useful, and legal Internet destinations and resources for Library patrons to access and explore. However, the Internet is currently an ungoverned and unregulated source of both verified and unverified information. While the Internet does contain a wealth of useful material, it also provides access to sites containing material that some

patrons may offensive or objectionable as well as access to sites that are illegal, unlawful, or obscene.

This Internet Policy is intended to affirm and serve to advance the following governmental interests:

(A) The protection of children from exposure to obscene material, child pornography, or material harmful to them; and

(B) The aid and support of parents and/or the guardians of children in the discharge of their primary responsibility for their children's well-being; and

(C) The prevention of the creation of a sexually hostile work environment for library Staff and patrons, and the prevention of discriminatory conduct; and

(D) The maintenance of discipline and order, and the limitation of disruptions in the study or work environment of the Library; and

(E) The minimization of providing access to illegal pornography; and

(F) The aid and support of Federal and state criminal and civil laws designed to deter and punish trafficking in obscenity, child pornography, stalking, and harassment by means of computer; and

(G) The promotion of respect for authority and traditional values, be they social, moral, or political; and

(H) With respect to minors, the exclusion of material which is "pervasively vulgar" or "educationally unsuitable" for the respective recipient age group.

(I) The preservation of the Right of the Nation and the States to Maintain a Decent Society.

In providing computer access as an information resource, such as the use of or providing access to or through the Internet, World Wide Web, or an interactive computer service (as defined in 47 U.S.C. § 230 (e)(1) and (2) and § 231 (e) (1) and (3)), the Library realizes that electronic display is more public in nature than other print media. It also recognizes that while it is impossible to monitor totally all the information or images that can be accessed on the Internet, some amount of control can be exercised. The Library will seek to facilitate, provide, and encourage Internet use in its facilities that is in accord with general community standards. The public dissemination of obscene material or child pornography is not necessary nor required under the Library's mission and is inconsistent with public policy and community standards. The Library also seeks to avoid and minimize the opportunity that unrestricted access to the Internet would result in exposure and exhibition of offensive sexual materials that could contribute to a hostile work environment or other sexual harassment or discipline problems within the Library environment

Recent news reports and studies indicate that the problem of children and adults (including registered sex offenders) accessing sexually explicit pornographic materials (including child pornography, bestiality, hard core adult pornography, and with respect to minors, pornography that is harmful to minors) in public libraries may result in situations potentially harmful to public health and safety. In particular, a 1999 report entitled "Dangerous Access," released by Filtering

Facts, a librarian organization that promotes the protection of children in public libraries, documents 503 incidents in which patrons have accessed pornography in public libraries. Children were involved in 245 of the incidents, and 20 involved child pornography, a molestation, and several attempted molestations. The report documents at least 195 incidents of children accessing pornography in public libraries, at an average age of 12 years. Many instances are reported where adults have exposed minor children to adult pornography and child pornography, such as would be done intentionally by pedophiles, child stalkers, or child pornography addicts. Most significantly, this Library's Board has identified more than 100 incidents in which patrons have viewed and displayed pornography. In a number of incidents, minor children and other unwilling patrons and Staff have been exposed to pornography and/or obscenity. Some of these exposures have been intentional. The viewing and displaying of pornography and/or obscenity has created an atmosphere that some patrons and Staff have described as negative and hostile.

The Library reserves the right to evaluate, test, use, and implement software and network control and filter mechanisms designed to limit or restrict access to sources of information or images deemed inappropriate for Library dissemination under the criteria set forth in Sections 2, 3 and 4, below. The Library reserves the right to restrict or attempt to restrict entry into the Library's computer terminals or network of any materials that may not or would not meet the Library's selection criteria or policy for the Library's physical book, film, magazine, or other collections, and the Library may use, employ, or delegate such judgments

and functions to outside parties, consultants, Internet service providers or filter services, as well as to staff and directors of the Library. Finally, the Library reserves the right to claim and take advantage of the "Good Samaritan" immunity protections for voluntary use of screening and blocking mechanisms and procedures to restrict access to pornographic, violent, harassing, or otherwise objectionable materials, whether nor not such material is otherwise constitutionally protected in other forums or places, as provided in federal law in Title 47, United States Code, Section 230 (c) (47 U.S.C. § 230 (c) (1) and (2)).

Section 2. Prohibited Access Criteria: The Library will implement software and/or network control mechanisms designed to limit or restrict access to sources of information or images that may be deemed to be Obscene, including hard-core pornography depicting sexual conduct where penetration of the genitals is clearly visible and other explicitly sexual pornographic representations of sexual conduct ("ultimate sexual acts, normal or perverted, actual or simulated, . . . masturbation, excretory functions, and lewd exhibition of the genitals") within the scope of federal and state obscenity laws and the constitutional test for obscenity provided by the United States Supreme Court in the "Miller Test" announced in Miller v. California, 413 U.S. 15, 24-25 (1973), Smith v. United States, 431 U.S. 291, 300-02, 309 (1977), Pope v. Illinois, 481 U.S. 497, 500-01 (1987), etc.

Section 3. Prohibited Access Criteria: The Library will implement software and/or network control mechanisms designed to limit or restrict access to images that may be deemed to be Child Pornography, containing a

visual representation of a minor under 18 years of age engaging in sexually explicit conduct, as defined in 18 U.S.C. § 2256.

(A) There is an inference, which may be rebutted, that a participant in sexual activity, depicted as a minor through its title, text, visual representation, or otherwise, is a minor.

(B) As used herein, sexual activity includes sexual acts by minors such as intercourse, oral sex, and includes "lascivious exhibition of the genitals or pubic area." In determining when genital or pubic area exhibitions are "lascivious," guidance shall be drawn by the following factors discussed in United States v. Dost, 636 F.Supp. 828, 832 (S. D. Cal. 1986), affirmed, sub nom, United States v. Wiegand, 812 F.2d 1239, 1244 (9th Cir. 1987), cert. denied, 484 U.S. 856 (1987):

1. examples of sexually suggestive or lewd photographs of children would be those in which the child is depicted as half or partially clothed, posed in such a way as to depict or suggest a willingness to engage in sexual activity or a sexually coy attitude.

2. In determining whether a visual depiction of a minor constitutes a lewd or lascivious exhibition of the genitals or pubic area, the following factors, among any others, may be relevant in the particular case:

   (a) whether the focal point of the visual depiction is on the child's genitalia or pubic area;

   (b) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;

   (c) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;

   (d) the child is fully or partially clothed, or nude;

   (e) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;

   (f) the visual depiction is intended or designed to elicit a sexual response in the viewer. A visual depiction need not involve all of these factors to be a lewd or lascivious exhibition of a minor's genitals or pubic area. A determination may be made based on the overall content of the visual depiction, taking into account the age of the minor and the nature of the work and its context, promotion, or marketing.

Section 4. Prohibited Access Criteria: While a computer providing access to the Internet or other interactive computer service is being used by a minor or is being used in an area accessible to or frequented by minors, during such use the Library may also implement software and/or network control mechanisms designed to limit or restrict access to sources of pornographic information or images that may be deemed to be "obscene as to minors" or "Harmful to Minors," as that term is used in federal (47 U.S.C. § 231 (e)(6)) and

similar state laws, for the age groups of minors who may be exposed to such materials.

Section 5. Application of Selection Criteria: The Library reserves the right to implement software and/or network control mechanisms designed to limit or restrict access to material that does not meet the established selection criteria that the Library applies to all other material, including material that violates federal, state, or local laws.

Section 6. Access to Terminals without Software and/or Network Control Mechanisms: Should an adult patron desire to access a computer terminal without software and/or network control mechanisms, the adult patron shall be allowed access to a computer terminal without software and/or network control mechanisms under the following conditions:

a. At Main, access shall be available on at least one computer terminal near the Reference Desk, and at each branch access shall be available on at least one computer terminal near the staff desk;

b. Access shall be available only after the adult patron

1. Has signed up for and attempted to access a site on a computer terminal in the public area (those computers employing software and/or network control mechanisms); and
2. Has been denied access by the software and/or network control mechanism; and
3. Has employed the appeal procedure available at the computer terminal in

the public area via the software and/or network control mechanism.

c. The adult patron shall not access information or images that meet the prohibited access criteria provided in sections 2 & 3 above.

d. The Internet Use Policy shall apply in every aspect at any computer terminal without software and/or network control mechanisms.

Section 7. Disclaimers Regarding Internet Use: The Library cannot verify or be held responsible for the accuracy, reliability, quality, timeliness, or legality of information found on the Internet. The Library has no control over the information contained on the Internet and is not responsible for its content. The Library cannot be held liable for the conduct of Internet users. The Library may not be able to control access to materials or protect patrons from materials they may find offensive. Library users access the Internet at their own discretion and risk, and they are responsible for evaluating the validity and appropriateness of information accessed. Users should be aware that the Internet is not a secure or private medium and that third parties may be able to obtain information regarding users' activities.

Section 8. Internet Safety Warning and Notice to Parents and Guardians: Because the Internet includes some information which parents and guardians may deem to be unsuitable for their children, parents and guardians must provide the necessary guidance and oversight of their children. Parents and guardians must ensure that they take all appropriate actions in respect to the use of the Internet at the Library by their minor children. The Library System and its staff cannot act in

the place of a parent or guardian. The safety and security of minors using electronic mail, chat, instant messaging, and other forms of direct electronic communication are the responsibility of the parent/guardian. Except as provided for in Section 6 of this Policy, all Internet enabled computers in public areas throughout the Library system shall have filtering software activated with the intent to provide for the safety and security of minors using Library services.

As a condition of Internet use at the Library, each user must agree to comply with all applicable laws, rules, and regulations, including without limitation, all rules and regulations which may be established from time to time by the Library. Further, each user must agree to take no action on the Internet which could cause the Library to incur any expense beyond the general access fees. By initiating use, the user agrees to the fullest extent permitted by law to hold the Library harmless from any liability for any wrongful conduct of the user, including without limitation, any such unauthorized expense, costs, and attorney's fees.

The Library reserves the right to refuse access to the Internet to any person or persons for the violation of this or any other policy of the Library, in accordance with applicable law. The following rules for the use of all Library Internet computers are adopted and established as an integral part of this policy:

Rules of Use for the Internet

1. Each user shall be deemed to agree, by advancing beyond the initial computer screens, to abide by the Library's Internet Use Policy.

2. Users must sign in to use the Internet.
3. Users must hold a library card issued by the Greenville County Library.
4. Users may sign-up for Internet access in increments of one hour based on availability of computers. Users may sign up for additional one-hour increments if computers continue to be available
5. Users may not send, receive, or display obscene materials, child pornography, and/or other materials prohibited under applicable local, state, and federal laws.
6. Users may not make unauthorized entry into other computational, informational, or communication services or resources.
7. Users may not misrepresent themselves or the Library by using computer accounts, access codes, numbers, passwords, signatures, or network identification assigned to others.
8. Users may not invade the privacy of others at any time or in any way.
9. Users may not use the Internet for illegal activities, including the violation of the rights of third parties, or activities inconsistent with the Library's tax-exempt status.
10. Users may not make any attempt to damage, alter, and/or bypass the Library System's computer equipment, software, or data, and/or the equipment, software, or data of others. In addition, users may not instruct or demonstrate to another user how to bypass

web-filtering technology or other software control mechanisms. Any user who violates this rule in any manner may lose access to the Internet or lose other Library privileges. Other sanctions may apply as described elsewhere in this document.

11. Copyright: U.S. Copyright Law (Title 17, U.S. Code) prohibits the unauthorized reproduction or distribution of copyrighted materials, except as permitted by the principles of "fair use." Subject to fair use, users may neither reproduce copyrighted materials (text, images, programs, and/or data) nor distribute such materials by any means (including electronic mail) without the explicit written permission of the copyright holder. Responsibility for any consequences of copyright infringement lies with the user. The Library expressly disclaims any liability or responsibility resulting from such use.
12. Only Library staff may reboot, restart, or log onto the Library's Internet computers.

If the Library determines that a user would benefit from additional instruction in the use of the Internet, the Library reserves the right to request that a user attend an orientation and/or training session.

Further, the Library reserves the right to limit the volume of printing of materials by patrons and/or to impose charges for such printing.

Violation of the Library's *Internet Use Policy* and of any other rules and regulations may result in a loss of access to the Internet (including the World Wide Web)

through the Library's Internet connection and/or a loss of other Library privileges. Unlawful activities may result in prosecution by local, state, and/or federal authorities.

Users may appeal the loss of access to the Internet under the provisions of the Library's *Suspension of Privileges Policy*.

Because of the unsettled state of applicable local, state, and federal laws, this policy is considered to be a working document and is being implemented on a trial basis. The Library reserves the right to make any changes in this policy at any time.

Section 9. Severability: If any section, sub-section, sentence, clause or any part of this Policy is for any reason, held or declared to be unconstitutional, inoperative or void, such holding or invalidity shall not affect the remaining portions of this Policy; and it shall be construed to have been the Board's intent to pass this Policy without such unconstitutional, inoperative or invalid part therein; and, the remainder of this Policy, after the exclusion of such part or parts, shall be held and deemed to be valid as if such excluded parts had not been included herein.

Section 10. Patron Privacy: The Greenville County Library System will not sell, rent, or otherwise distribute or disclose a patron's e-mail address, postal address, phone number, web sites visited, computer time used, borrower records or other personal information, individually or in aggregate, unless required to do so by court order.

This policy will become effective on August 21, 2000. **(Revised 1/22/2001, May 21, 2001, and September 24, 2001)**

[Footer Omitted]

[D. Ex. 160]
[Pasadena, Texas, Public Library Internet Use Policy]

Pasadena
TEXAS

Internet Rules and Procedures
(May 1999)

1. To use the library computers, you must sign-in at the Information Desk with the library employee then in charge of the "sign-in" list.

2. Only one person is allowed to use an Internet terminal at a time, except for parents who are monitoring the work of their children on the Internet.

This rule was needed because the numbers of people who would gather around the terminals often creating a noisy situation that troubled other library users.

A parent or guardian may use a terminal with children, but that parent is responsible for adhering to the thirty-minute time limit. Also, a person 14-years-old with a high school ID may use the Internet terminals in the adult department.

3. A 30-minute time limit will be enforced when others are waiting to use a terminal. No extra time will be added for restarting the computer.

4. A user is limited to one signed-in Internet session during peak use periods.

5. Priority on the use of the Internet is given to those using it for academic or research purposes; these users will receive priority access over those using the Internet for entertainment purposes.

Handicapped users will be given priority to spaces designated for handicapped individuals. There shall be appropriate signage indicating which workstations are so designated.

6. The library can provide fifteen sheets of paper forprinting research or academic information from the Internet.

7. Users of computers in the adult area must be 14 years of age or older.

8. Users may not access chat-rooms or e-mail on the library computers.

9. The library has recently implemented Internet filtering in order to ensure that the Internet is used responsibly.

The library filters the following sites for the computers designated as the Children's OPACs (the computers are filtered as "C," child):

1 Chat
2. E-mail
3. Criminal Skills
4. Dating
5. Extreme or Obscene
6. Games

7. Hate Speech
8. Sex

The library filters the following sites in the computers designated as the adult OPACs at both the Main Library and the Fairmont Branch Library (the computers are filtered as "A," Adult):

1. Chat
2. E-mail
3. Extreme or Obscene
4. Games
5. Sex

10. Users are prohibited from engaging in illegal, tortuous or destructive activities on the Internet.

11. Users may not turn the computer off when they are finished using it.

12. If you experience any mechanical problems with the equipment, ask the library staff for help.

13. The library expressly disclaims any liability or responsibility arising from access to or use of information from the Internet through its facilities, or any consequences thereof.

14. The library reserves the right to update and change this policy at any time without notice. It is the responsibility of the library patron to read and accept the current version of the policy. Any violation of the rules may result in the patron being denied access to library facilities.

15. The designated Internet stations are monitored by staff for assistance and security.

The library reserves the right to require all prospective users to read the policies and procedures for computer and Internet usage and to sign an acknowledgment that they read and understood these rules.

The library reserves the right to remove Internet privileges from library users who violate these rules. The library also reserves the right to remove users who fail to comply with the library's rules.

16. The library reserves the right to require all prospective users to attend an orientation session as a condition for access to the Library Internet

[D. Ex. 186]
[Expert Report of Donald G. Davis, Jr.]

DEFENDANTS EXPERT WITNESS REPORT OF DONALD G. DAVIS, JR.

1. My name is Donald G. Davis, Jr., professor in the Graduate School of Library & Information Science, University of Texas at Austin, where I also have an appointment as professor of history. For Fall 2001 I am also serving as Interim Dean of the School. I have been a librarian and taught graduate-level library science courses since 1964. Following a B.A. degree in history from UCLA, I earned the M.A. in history and the M.L.S. from University of California, Berkeley. After several years as reference and special collections librarian at Fresno State College in California, I completed the Ph.D. degree at the Graduate School of Library & Information Science, University of Illinois at Urbana-Champaign in 1972.

2. In my years at Texas that began in 1971 I have taught courses related to the history of archives, books, and libraries; issues in contemporary publishing; and Collection Development, a popular elective that I have taught since 1975. In conjunction with teaching the Collection Development course to literally hundreds of students, I have supervised numerous projects that assessed and evaluated library collections of all kinds. In addition to more than a dozen authored and edited volumes, I have published over 130 book chapters, articles, and reports—as well as more than 250 book reviews for scholarly and professional media. Since 1977 I have edited Libraries & Culture, a scholarly journal published quarterly by University of Texas Press. Among my books are American Library History: A Comprehensive

Guide to the Literature (1989) and Encyclopedia of Library History (1994)—both co-authored.

3. I have been a continuous member of the American Library Association (ALA) since 1964 and have served as an elected officer and held appointments on several committees. I have served as chair of the ALA Library History Round Table that established an article award in my name two years ago. As a professor, and scholar I have devoted my career to educating new members of the profession. As a recognized scholar-editor in the field of American library history—and who, at the same time, teaches Collection Development and Management and participates in the assessment process for library collections and the evaluation of individual works—I believe that I am qualified to speak in support of the Defendants.

4. The U.S. Department of Justice has asked me to render an opinion on several issues that concern this case: (1) the historic mission and purpose of the public library, (2) the education and preparation of librarians to assume selection responsibilities, (3) the role of selection in the acquisition of library materials, (4) the publications that the profession has generated to assist its members in the responsibility of selection, (5) the role of professional judgment in selecting materials with diverse content, (6) the significance of reciprocal responsibilities of the library and its community of support, and (7) the implications that these trends hold for treatment and management of Internet resources dealt with in the Children's Internet Protection Act (CIPA). Each issue is considered briefly from an historical perspective with references to a selective list of standard sources appended.

5. First, in my opinion, the historic mission and purpose of the public library have been primarily educational in nature—both explicitly and implicitly. Education does not refer, of course, to learning only through textbooks and in classrooms, but through the whole corpus of human experience that has contributed to who we are as a people and a species.

6. The modern public library movement in the United States developed in the mid-nineteenth century in response to the need expressed by citizens in communities to support with tax revenues a collection of books, journals, and other materials that would benefit all groups in society. The concept of such a public institution gained popularity in Great Britain, the United States, and the Western nations at about the same time. By the twentieth century it had attracted the attention of not only Andrew Carnegie and other benefactors, but of people throughout the world. [ELH 519-521]

7. The movement that coalesced in the middle 1800s was grounded in institutions that immediately preceded it—such as, social libraries, circulating libraries, athenaeums, lyceums, Sunday school libraries, YMCA libraries, ladies' libraries, etc. With the establishment of enabling legislation in New England in the years spanning 1850, the modern public library began—available to all readers, supported by public funds, and a social institution integral to local government. The founders of these libraries—the most notable being the Boston Public Library that opened in 1854—wished "to promote equality of education opportunity, to advance scientific investigation, to save youth from the evils of an ill-spent leisure, and to promote the vocational advancement of the workers [Shera, 247]." The goal was

the enlightenment and improvement of individuals, and through this to elevate society. The first point in the American Library Association's "Library Bill of Rights" reflects the continuing significance of this idea when it declares boldly "Books and other library resources should be provided for the interest, information, and enlightenment of all people of the community the library serves." [IFM 3]

8. This notion of the educational and civilizing purpose of the public library was the persuasive argument for the widespread support and spread of public libraries throughout New England, the middle Atlantic states, and the Middle West—and ultimately the West and the South. This broadly based appeal was significant as a foundation for the public library movement. The initial emphasis on the educational values promoted by the public library has continued as exemplified in the frequently employed the moniker of "the people's university." [Ditzion 77-96]

9. Other complementary purposes joined education over time. The civic aim incorporated the notion that individuals would become more responsible citizens if they were informed about issues; they would vote more intelligently if they had information on matters before the electorate. The utilitarian purpose suggested that one of the functions of the public library was to enable citizens to succeed in their occupations and professions and generally to develop their potential in whatever field in which they were engaged. Yet another purpose has come to be the recreational function; citizens find at the public library a variety of resources available to engage their leisure time. [Ditzion 190-193] Engaging in this latter purpose, libraries abut, but do not intend to compete with, commercial enterprises that provide the

spectrum of services and technologies catering to popular taste and media.

10. Each of these purposes has energized and been promoted by libraries, sometimes simultaneously, throughout the past century and a half. Communities and their libraries have had to decide what emphases and priorities would prevail. As late as the mid 1960s the provision of reference and information service was seen as the critical contribution of public libraries. [Lee 118-119] But whether explicitly educational or not, all public libraries have embraced goals that they deemed to be of benefit to society and their communities; none have adopted goals that would result in degrading, injuring, or harming users, or potential users, of their institutions. In fact, they would likely refrain from encouraging the use of such in a publicly supported agency. Materials prohibited by the CIPA–visual representations of obscene materials, child pornography, and other images harmful to minors—have not been among the resources selected for the enrichment of society. Public librarians from the earliest years have considered the welfare of their patrons in the selection process. In short, public libraries are in reality one of the "helping professions"—one that helps and benefits people through the tools of information resources at all levels. [WELIS 674]

11. Ongoing and recent promotions of the innate and social value of reading, and its accompanying benefits for society have emphasized goals that were positive and helpful for their communities. The prominence given to reading and library visits has again reminded citizens that the educational purpose of the public library, notwithstanding incorporation of the complementary purposes, is paramount. [Lee 112-127] When

entire cities, for example, concentrate on reading a single work and when reading and book clubs flourish in communities, the educational and civilizing aim is being realized. Strengthening community values, broadly conceived, is again gaining support from both the library community and the community at large. [McCabe 95-102]

12. Second, in my opinion, since Melvil Dewey's first school at Columbia more than eleven decades ago, library and information science programs that provide graduate-level professional education to produce qualified librarians have sought and required broad educational preparation for their applicants. Moreover they have sought to encourage intellectual curiosity and lifelong learning in their graduates.

13. For most of the past century schools that educated future librarians were proud of the fact that accepted applicants possessed a broad, liberal arts education. In current professional library programs, students undertake a rather broad series of courses that will prepare them for library employment in a variety of settings. Most library schools allow for some specialization, so that students intending to work as a selector of materials may take several specific courses that deal with the literature, reference works, and information sources in broad subject areas. Many students who aim toward work in public libraries are already beginning to demonstrate the kind of knowledge that that kind of context requires, because they read widely, are developing taste, and are becoming sensitive to the needs of patrons in given communities. [WELIS 486-491]

14. In addition to formal classroom instruction, students frequently engage in projects in libraries,

including public libraries. This often promotes a kind of mentoring role with respect to the supervising librarian. Many students who aspire to becoming public librarians will find part or full-time employment in public libraries and gain valuable experience in evaluating patron requests and available materials. When collection evaluation projects are undertaken in a local public library, the students receive first-hand experience of judging the relative value of items in a collection and the adequacy of the collection as a whole. These kinds of apprenticeships are building blocks in gaining professional competence.

15. Through education and experience, then, librarians are equipped to make the kinds of judgments that one would expect of a professional who is trained in this area. Professional education programs are acutely aware of what their graduates will need to perform on the job and they seek through a variety of means to provide them with the preparation they need. Graduates from professional library and information programs are most effective, especially in public libraries, when they have had wide exposure with the world of ideas, communication patterns, and community needs. [Evans (2000) 25-26]

16. Third, in my opinion, the role of selection in the acquisition of library materials has been one of the primary, if not the primary, tasks of the professional librarian. It remains so today.

17. From the earliest noted predecessors of the public library to the present, the custodians of collections—the librarians—have been obliged to choose what they will select and ultimately acquire for their store of materials from an increasingly vast universe of information resources. They have done this most effectively when

they have understood the purposes of their libraries, the needs of their served communities, and the nature and scope of available resources. Limited funds, in almost every situation, further dictated that judicious choices were necessary. This process took the form of consensus among the libraries' members or decisions delegated to members of the library staff who were considered knowledgeable in specific areas. The collection creating and building activities of the early major public libraries frequently involved scholar-librarians and bibliographers who were thoroughly expert in the world of books, such as William Frederick Poole, a leading authority in the latter half of the nineteenth century, especially as director of the Chicago Public Library. [WELIS 214-215; Wortman 1-2]

18. When the American Library Association (ALA) was founded in 1876, an effort was made to analyze, systematize, and regularize basic functions of the developing profession. Along with the publication of Melvil Dewey's Dewey Decimal Classification, in that year the U.S. Bureau of Education published its special report entitled Public Libraries in the United States of America: Their History, Condition, and Management—an encyclopedic manual of more than 1200 pages. One of the 39 chapters in this handbook was written by Poole on "The Organization and Management of Public Libraries" [476-504] in which he devoted three pages to "Selection of Books," laying out some principles that could guide public librarians in the selection of materials. A later chapter by A.R. Spofford, Librarian of Congress, offered a "List of the Principal Books of Reference Important to be Used in Libraries" that consists of the essential information sources of the time. [688-710] Early on, publications, such as lists and

bibliographies, began that brought together the collective mind of the profession to identify the significant, the best, the important items that are desirable for public libraries and their patrons.

19. While the debate soon began, and has continued, on what kinds of popular materials to include in public library collections, what proportion of the materials' budget should be expended on varieties of fiction, what groups of readers or users deserved more or less attention—the profession through its Association continued to insist that one of the librarian's primary professional functions was to select quality materials that supported the reasonable information needs of the community groups and individual members. Librarians have needed to balance the perceived demands of their patrons with the public trust of spending funds prudently. Responsible for some knowledge of a work's content, reputation (author and publisher), presentation, special features, and physical format—professional staff members needed informed judgment to make good decisions. Since no one librarian can know enough, despite his or her broad education and professional training, groups within the profession began to compile bibliographies of recommended works, create lists of desirable titles, and produce reviewing media with professionally-oriented assessments of current books and other materials. [Evans (2000) 91-95ff.]

20. Fourth, in my opinion, the publications that the profession has developed to assist librarians provide evidence that the selection function is a critical part of the professional librarian's task. The fact that these publications, produced and distributed widely by the ALA and other publishers to the profession, have been

used for so long, by so many speaks for itself about the needs of the profession.

21. Early in the twentieth century the profession, through its principal association and other publishers, began to establish regular works that consolidated the quality evaluations that librarians valued in selecting the potential purchases and assessing their collections. A few examples illustrate this commitment. The ALA initiated Booklist in 1905 to assist the staff of public libraries to make knowledgeable decisions in the selection of materials. Currently, it is a semimonthly reviewing journal that states as its purpose in mid 2001 "to provide a guide to current print and audiovisual materials worthy of consideration for purchase by small and medium-sized public libraries and school library media centers. A review in Booklist constitutes a recommendation for library purchase [July 2001]." The entries do not include the kind of explicit visual depictions that are subject of the current litigation. The Association produced its Guide to Reference Books for the first time in 1907. Its success is symbolized by the massive eleventh edition that appeared in 1996. This standard work of scholarly description and evaluation is a working tool for thousands of librarians in the United States and elsewhere and has served this function for nearly a century. Reference Books Bulletin, another organ of the ALA that began under an earlier title in 1930, serves to supplement the Guide for current material and appears in conjunction with Booklist, the reviewing medium discussed above. Public librarians who are doing their job conscientiously rely on these helpful professional tools.

22. Several works produced by other distinguished publishers also augment the selection and evaluation

aids developed by the ALA. The H.W. Wilson Company publishes several catalogs of books for various audiences, each at several year intervals. Two of these serve public librarians especially. The first is the Fiction Catalog that began in 1908; the 14th edition appeared in 2001. The second is the Public Library Catalog that began in 1934; the 11th edition appeared in 1994. Each includes several thousand annotated titles and has annual supplements between editions. The first of these is described as a "standard work that lists and annotates a selection of the best fiction in English, along with a generous representation of foreign fiction that has been translated into English. . . . Together with its companion, . . . which includes works of fiction criticism, it forms a comprehensive bibliography of recommended fiction and nonfiction for adults [Guide, 500]." Introductions to these works indicate that they can be used as aids in selection of and in evaluating material. A third work that illustrates the selection emphasis of the profession is The Reader's Adviser, published by the R. R. Bowker Company since 1921; the 14th edition in six volumes appeared in 1994. It is designed to be a guide to the recommended "best" books in English in the various fields of human knowledge. The publisher released a CD-ROM version of this work in 1996 that includes 58,000 titles. The implicit, if not explicit, criteria used in the professional works mentioned above do not support inclusion of pornographic and sexually explicit, graphic materials.

23. That recommendations for quality selection remain a priority of professional activity is evident from the several pages of the Summer/Fall 2001 catalog of ALA publications. Among the many titles devoted to the subject, one finds Best Books for Young Adults, 2d ed.

(2000) which is accompanied by the following description: "For serving the needs and interests of young adult readers—from avid to reluctant, these trusted bibliographies are sorted into more than 25 themes covering the gamut from adventure to youth in trouble [23]." Selecting materials for children and young adults is a serious matter. School librarians and children's librarians in public libraries, as well as teachers, understand this. They typically take courses in the subject during the credentialing process, learning "to analyze books as carefully and objectively" as possible and to develop judgments that are "both informed and objective." [Sutherland 25-26] Among the literary elements often considered are: setting, point of view, characters, plot, theme, and style—in addition to author, illustrator, publisher, and age of audience. In short, children's librarians, while educated to develop their own judgment and taste, value the recommendations of even more experienced colleagues because they have been entrusted with nurturing the future generation.

24. Textbooks also are another means that the profession has used to codify current best practice and to communicate this knowledge to the next generation. Many of these textbooks have concentrated on the crucial role of the selection process. From the 1920s onward, a succession of standard texts has suggested criteria for selection of fiction and non-fiction works for libraries of all kinds, but particularly public libraries [Evans (2000), 92-93]. Among these authorities are Arthur E. Bostwick (1929), Francis Drury (1930), Helen Haines (1950), William Katz (1980), Robert Broadus (1981), Arthur Curley and Dorothy Broderick (1985), and G. Edward Evans (1995 and 2001). Each author's work, attempting to balance the library's responsibility

with the needs of the community, wielded considerable influence in its time and together are worth studying for what they reveal about the continuing necessity for informed professional judgment based on experience and knowledge in the process of selection.

25. Fifth, in my opinion, professional judgment regarding content, as well as format, readership, etc., has been a distinguishing and characteristic trait that librarians have developed and exercised.

26. Though there is considerable debate within the profession, especially from the 1960s to the present regarding the skill involved in, and even the legitimacy of, evaluating the quality of materials with a view to selection, when the dust settles the publications cited above—reviewing media, bibliographical works and textbooks—continue to be published because they fill a need in evaluating content, a need that the profession has embraced. Critics and analysts may not agree with every criterion applied in past and current generations, but they cannot deny that the profession has considered the selection function to be a significant one—partly assumed and partly thrust upon it. As one authority begins his text, "The library's primary service is a good collection." [Wortman 1]

27. The fact that professional judgment, taking into consideration the purpose of the library and the unique needs and requirements of the community, has been rendered by librarians for the past 150 years and before and is still a cornerstone of professional practice raises an interesting issue. Though selection is seen generally as a positive process, every time a librarian chooses one item and not another, a professional judgment is made. When material is not selected or deselected, for a variety of reasons, the decision is best made not in a whim-

sical or even personal perspective, but in the light of specific guidelines that have been agreed upon through as much consensual discussion as possible.

28. Most librarians in most public libraries, therefore, have given careful thought to the kinds of materials and the depths of coverage—formats, treatments, and topics—that need to be evaluated carefully before determining whether or not they should be included in their collections. Each new communication medium and format thus undergoes scrutiny to understand how it fits the purpose of the library and contributes to the particular mission of the library. Although the educational preparation and broad experience prepare librarians for their selection responsibilities, they frequently seek assistance from reliable sources that can assist them in judging content, as well as format and the intended audience. [Evans (2000) xix]

29. Component elements to be considered in the selection of individual items commonly include *content* (niche, currency, veracity, perspective or bias), *reputation of author and publisher, appropriateness and adequacy of presentation, added value of special features* (illustrations, documentation, index[es], and bibliography), and *physical format* (paper, binding, design, typography). If a general and overriding consideration is the benefit or the good that this selected item will bring to the community served, then the issue of content is of prime consideration and not easily ignored. [Broadus 85-99] In addition to applying to individual considerations, the various categories of criteria may be used to make decisions between alternative selections and competing items. These elements will naturally carry more or less weight depending on the purpose of the collection. With a vast universe of materials available

for selection, librarians naturally want to select that which will provide the most value for the cost. [Evans (2000) 15-16]

30. While embracing First Amendment principles, public libraries have had to interpret what particular role or niche in the cultural world they would play. While declaring that they were committed to provision of materials for "the interest, information, and enlightenment" of all, library staff members know that the library cannot (and likely should not) supply all the material that is available. In fact, many considerations enter in to what materials a library will include in its collection. In addition to decisions about media and formats, other questions about potential problem materials arise. These categories include costly materials, ephemera and fragile materials, high-risk and unprotected materials, as well as other materials that do not contribute to the purpose of the library. Not only do the collecting contours of genre or fiction and non-fiction, reference, and foreign language works need to be determined. Subject fields like law, medicine, religion and genealogy many times require guidelines for appropriate selection. Materials dealing with drug and substance abuse, obscenity and pornography, materials unsuitable or harmful to minors, semi-and pseudo-scientific works, unbridled and offensive social propaganda, not to speak of guns, firearms and explosives—all require and receive consideration utilizing the professional judgment of librarians.

31. While some of these fields are governed by statutory law, most are not. Librarians apply their informed judgment when they assume responsibility for selecting materials. Legal considerations are only the minimal and "worst case scenario" among considerations. Pro-

fessionals hold to higher standards that reflect their user groups. Children and minors pose a special case, as they do in virtually every civilized society, and are protected from behavior that will affect them adversely. In any event, most librarians strive in the most delicate manner to balance individual needs with the public good. The critical point is that selection of materials in libraries occurs regularly in a variety ways. How that public good is understood and determined is and should be a matter for discussion.

32. The notion that the kind of professional judgment applied to individual print and non-print items should also be applied to the Internet is consistent with historic professional practice. Rather than considering the initiation of Internet access as simply one selection decision to acquire one item—such as, for example, a very large and exhaustive encyclopedia—those responsible for selection might well view Internet access as a kind of approval plan whereby many items come to the library for review and those that do not meet the library's collection profile are returned to the vendor. In the case of the Internet, the use of filters accomplishes a similar function. Likewise, Internet materials arrive unsolicited at the library and might well be subject to the same collection profile review, albeit using technological devices. Categories—such as "extreme/obscene-/violent" and "adult/sexually explicit," for example—are not included in public libraries' subjects for active selection. Why then, some would ask, should they be included in the Internet fare offered to public library users? As filtering devices become ever more effective, and are accompanied by adequate safeguards that allow for overriding limitations for reasonable use, they can ensure that selection standards will remain intact.

33. Sixth, in my opinion, libraries, and particularly public libraries, because of their community-based support and their accountability to their constituents have been and remain inextricably linked. They must serve one another to be effective. They need, and are instructed in how, to carefully assess the needs of their communities and apply their professional judgment to selection decisions. Thus they have developed strategies to assist them—community analyses and collection development policies.

34. There would seem to be little question that selection of materials is a primary function of professional librarians and that they, and their constituent communities, wish for it to remain so. Among the principles, or maxims, of materials selection is one that urges librarians to understand their communities and their needs for information and ideas as they pursue the life of the mind. This can be an arduous assignment, even if aided by data generated by public and commercial sources. Without such an understanding, librarians can too easily ignore the information needs and expectations of their natural clientele. Ultimately, from the vast universe of information materials—books, journals, audiovisual media, and electronic resources—librarians are obliged to select knowledgably for their communities and patron groups those items and categories of materials that will most effectively satisfy the needs identified.

35. While librarians wish to serve as intellectual provocateurs, they know that public libraries have never been able, nor seen fit, to provide all available material to their communities. However, by weighing the relative value of their acquisitions, librarians exercise their judgment as to what materials will meet the needs of

their users and potential users. Public libraries are, after all, "public" libraries—and as such, reflect largely the range of common values shared by community groups, rather than the isolated, unique needs of solitary individuals that might be better served through other entities. [Evans (2000) 31-63]

36. Public librarians, in particular, are trusted by the public to be accountable to their communities for the decisions that they make that support the purpose of their institutions that are, in turn, made possible by public funds—local, state, and federal—funds that the people through their elected representatives provide. Thus, conscientious librarians make every effort to understand the nature of their communities—the socio-economic demographics, the cultural and intellectual infrastructures, and the historical-geographical contexts—in order to select materials that will be optimally useful. As communities change in character, the selection of materials also changes. This can result in adding new materials and in deselecting other materials, so that the collection provides optimum support for members of their communities. Deselection, or "weeding" of collections, is commonplace for public libraries and should be done regularly according to standard guidelines. However, public libraries will be unlikely to deselect materials that concern this litigation, because they were never selected for the collection in the first place.

37. A frequent way in which ideas, principles, and processes of selection may be forthright and useful to both staff and the public is accomplished through the development of documents that lay down some of the understandings of groups to be served and of the criteria that will be applied in decision-making—in other

words, a selection policy. As important as indicating what materials will be collected are guidelines that indicate what material will not be selected—for a variety of reasons that have been carefully considered beforehand. When these policies are developed in concert with local communities and are used as guidelines for selection, then both the professional library leadership and the community represented by the public can be well served. Donations and gifts of materials are subject to the same selection considerations as materials that the library purchases. While it is true that no criteria or standards are, nor should they be, applied rigidly in every public and school library in every community, thoughtfully constructed selection policies can serve as a catalyst for developing mutual support. Furthermore, the profession has long held the conviction that the more time and effort expended in the establishment of these policies in advance, the fewer the problems will develop at a later date. Those difficulties that persist can be minimized. [Futas 331-233; Evans (2000) 69-86]

38. Seventh, and finally, in my opinion, if public libraries honor their heritage and are consistent in their maintaining quality standards in the selection of library materials, they will apply the same standards to Internet resources that they apply to other materials. The medium is decidedly different, but if the mission remains intact, means that match the medium can assist librarians and their communities to fulfill their mission.

39. A library historian, looking at the history of the public library movement in America from the mid nineteenth century to the present, must acknowledge that the selection process is deeply imbedded in what consti-

tutes professionalism in the library profession. It is also what the general public has come to expect of their librarians. The manner in which principles of selection apply to the pervasive and ubiquitous electronic media is a hotly debated issue within the profession, if not in American society at large. The professional staff members in public libraries intuitively understand that their qualifications have equipped them to help their users locate and utilize reliable websites—as the current helpful column, "Web Watch," in one of the most influential journals of the profession, *Library Journal*, underscores. There is, of course, no similar column for pornographic sites displaying visual images unsuitable for children—nor is there likely to be.

40. A complementary strategy that can work for the same end, to bring Internet materials in line with existing selection practices that reflect is the employment of filters that, judiciously monitored, can maintain to some extent the kind of criteria that make the library an attractive place for all, including children. They can use technology to solve problems that technology introduces. A unique medium may well require new approaches to ensure the desired end. One can only wonder why many in a profession that is enthusiastic, with good reason, about the immense promise and power of Internet access to information and ideas seem most reluctant to utilize developing tools to accomplish their time-honored goals of providing material of "interest, information, and enlightenment" to its tax-supporting users. As many public libraries have demonstrated, there is no intrinsic reason why filtering devices cannot be used in a beneficial way.

41. In any case, large segments, quite likely the majority, of the general public expect librarians to use

their professional judgment wisely and exercise their options when dealing with newer technologies. [Evans (2000) 562-563] Supporters of public libraries will rightfully want to be assured that the selection of materials and provision of access to electronic information—visual, as well as text—is consistent with the mission and purpose of the library. Librarians either select, or they do not. They either practice their professional competence or they risk becoming mere technicians and managers. Visual depictions that are considered obscene, child pornography, and harmful to minors (CIPA) are clearly not found in general public library collections. Many citizens and librarians will envision no loss in their absence from the Internet for children in their community libraries. The Internet is hardly a medium that nullifies the role that public libraries have played from their inception—a point underscored by a recent article in American Libraries. [Herring, April 2001] Librarians will need to deal with this issue in a forthright and accountable manner.

42. The fact that some members of the library profession are reluctant to undertake the obligations of selection and deselection in relation to the world wide web that they have historically carried out as a public trust with conventional media reveals an inconsistency with the purpose of the public library. For librarians to abandon this function is tantamount to abandoning the core of the professional vocation. What other profession refers clients to the unregulated Internet for information? The American nation and local communities—as reflected by taxpayers, the voting electorate, and their elected representatives at all levels—entrust to their public libraries the professional responsibility to discharge their historical, legitimate, and necessary

role of providing materials of human culture for the benefit of all. [WELIS 218]

43. For my services in the present litigation, I am being reimbursed by the Department of Justice at the rate of $110.00 per hour.

44. I have not served as an expert witness in a legal case in the past four years.

* * * * *

Dated October 12, 2001

signed /s/ DONALD G. DAVIS, JR.
DONALD G. DAVIS, JR.

[D. Ex. 187]
[Rebuttal Expert Report of Donald G. Davis, Jr.]

RESPONSES TO *ALA v. USA* EXPERT WITNESS REPORTS OF JOSEPH JANES, ANNE LIPOW, AND MICHAEL RYAN

by

Donald G. Davis, Jr.
28 November 2001

1. My responses to the Expert Witness Reports of Joseph Janes, Anne Lipow, and Michael Ryan center on two primary points—(1) the general and professional qualifications and the relevant experience of the witnesses to deal with collection development issues and (2) the weaknesses displayed in their statements and arguments relevant to collection development in public libraries.

2. An issue that recurs throughout the report of Janes and the others is the lack of differentiation between various types of libraries. The mission of research libraries, for example, differs substantially from that of public libraries, since the former strives to build comprehensive collections of specialized materials—many of them unique in character—designed for research at the highest levels. They are not intended to serve the general public. The Association of Research Libraries consists of about 120 such institutions in the United States. The mission and role of institutions, such as the Library of Congress and the great university libraries of America, differ dramatically from those of general, community-based public libraries.

3. Joseph Janes. Though Dr. James has taught at the undergraduate and graduate/professional level, among the courses he lists in his report (p.1), one does not find courses related to general collection development and management or content-related issues in public libraries. His interests appear directed primarily toward *promoting applications of Internet resources.* His record of professional activity does not suggest extensive experience in selecting a variety of materials for public libraries. Though Janes has published on digital, electronic information services, he does not appear to have had employment or a sustained association with a real (as opposed to virtual) public library, nor to have taught collection development and management or supervised projects in that subject in the broad context of public libraries.

4. *The main conclusion of the Janes expert report* is that "the blocking programs tested block a significant amount of content that would be appropriate in a library setting" (p.7). Janes conducted his study by using analyses of websites, selected from a database of alleged overblocked sites supplied to him by the plaintiffs' expert. The very term "overblocking"—a term that means blocking a site that has some usefulness—is inextricably linked to the conception of what is essential information for those requiring it, in this case, patrons in a public library. The assignment of the label "overblocking," is conditioned by one's understanding of the institutional context for which the site is being considered. As will be shown below, Janes and the other witnesses do not clearly define the specific context of the public libraries, or specifically the uses made by minors.

5. The study that Janes made of the sampling of a file containing alleged overblocked sites, received from the plaintiffs' expert, made use of 16 students and former students at the Washington school—eleven of which had "less direct experience" and five with "much more experience in school or public library collection development and reference work." (p.4). In the absence of information about the qualifications of either group—how many of the respondents were students and how many had been doing selection work and how then they were able to interpret the instructions for evaluating the sites assigned to them—the study's conclusions are not useable. Judging by my thirty years of teaching experience, most students, though eager and sometimes knowledgeable, have had little experience in actual selection situations. The smaller group of five is described as those with "substantially more experience in library reference and collection development work."(p.7). Considering the absence of specific information about the extent of broad experience in public libraries of these five, the conclusions of this group, too, raise a question of credibility. In short, there is no evidence from which once may ascertain whether these selected respondents can possibly be considered reliable judges in this study.

6. The instructions that the current and former students recruited as judges in the Janes study received (pp.4-6) appear to have been designed to elicit the desired responses. They do not conform to standard kinds of quality content criteria that selectors of materials for public libraries utilize. They include simply whether or not similar information is in libraries, whether or not given infinite resources a librarian might select this information source, and

whether or not any patron of any age might ever be referred to such a source. The fact that public libraries are the context of evaluation is not explicitly acknowledged in the above instructions given to the respondents. In fact they include some "criteria" that are false. They insist, for example, on the faulty premises that (1) whatever is in any library anywhere is a reasonable standard, that (2) a state of infinite resources is the goal of public libraries, and that (3) whatever information whatsoever that a patron of any age asks for is a reasonable request for a public library to supply. The instructions, or "criteria," are in reality only directions or instructions to respondents in this study that refer to *perception* of real or imagined usage. They are in effect, not criteria for content selection at all. However, these instructions merit closer examination in the following three paragraphs.

7. Janes's first instruction (a) is to identify "information similar to that already found in libraries" (pp.4,6). What type of libraries were the students/respondents asked to consider—public libraries that serve the general public, or research and special libraries, as well? Without any qualifications whatsoever, this instruction seems almost irrelevant, in that *some* libraries *somewhere* will contain just about any kind of material. What about the types of libraries—public libraries and school libraries—addressed in the CIPA? This is a critical point for clarification, otherwise the respondents might well have responded in a manner not consistent with the supposed intent of the study. It vitiates the integrity of the results. This appears to be a non-criterion.

8. Janes's second instruction (b) is to identify "information a librarian would want in the library if s/he had unlimited funds to purchase information and unlimited shelf space" (pp.4,6). However, in real life public librarians do not select only on the basis of space and funds being unlimited. They select materials that fit and conform to the standards established by their collection development policies that have, in turn, been developed with community involvement. The meaning of "selection" is *selection*—not *collection*. A hypothetical collection of everything that has been produced is not only of dubious value, but actually detrimental to users trying to find what they want to find and really need. Even research and national libraries, such as the Library of Congress, select from the vast array of materials those items that they will add to their collections. The Library of Congress has long since ceased adding to its collections all the materials it receives through the copyright deposit program. This instruction, too, is a non-criterion.

9. Janes's third instruction (c) is to identify information that the respondent "would be willing to refer a patron (of any age) to the site if the patron appeared at a reference desk seeking information about the subject of the site" (pp.5,6). Janes continues with further directions: "Sites that have a commercial purpose should be included here if they might be of use or interest to someone wishing to buy a product or service or doing research on the Internet, much as most libraries include the Yellow Pages in their collections. A site that is purely erotica should not be noted." Again, this is no real criterion that deals with content, but simply an appeal to supply what a patron wishes to see. What defines the limits of "willing" as far as the eleven less

experienced respondents are concerned? This direction is a far more subjective and personal one than criteria that librarians professionally trained in collection development use in selecting other materials, such as accurate and reliable sources. Janes's instruction is wholly dependent on what the judges in the study (in this case, respondents with varied levels of experience) consider reasonable. It does not take into account content, except in a single matter of erotica. If "purely erotic" is being used as a euphemism for pornography or materials unsuitable for children, this is a subtle misinterpretation of the word. But, if *some* libraries collect this, why is this, and this alone, excluded? Why not material related to bomb making, child pornography, gratuitous violence, terrorist tactics, child abuse, etc? One does not find these materials recommended for the Internet Public Library—a digital resource with which Janes has been associated and that is discussed in the next paragraph. Is the implication that public libraries do not collect this kind of material? If so, there are many other categories of materials that libraries do not select for a wide variety of reasons. The emphatic instruction to include sites with a "commercial purpose" in the amended criterion (c) on p.6, on the basis that the Yellow Pages are automatically included in public library collections is absurd. Even though the Yellow Pages is a well known source, the entries themselves are not fully evaluated for authenticity. No public library directly supplies detailed information on every service advertised as available in the Yellow Pages. If the issue is that of providing any information whatsoever that a patron of any age wants, why is nothing is excluded except pure erotica. In short this, too, is a non-criterion.

10. The Internet Public Library (IPL), which Janes helped to found in the late 1990's, defines itself as "a public service organization and learning/teaching environment at the University of Michigan School of Information" (http://www.ipl.org/). It further describes itself as a project that "seeks to challenge and redefine the roles and significance of libraries in an increasingly distributed and digital world." Even though the principles listed strive to portray content-neutrality, the mission statement, adopted 21 April 2001, gives six activities that are common to public libraries, including "service." Among the tasks describing service are the following: "finding, evaluating, selecting, organizing, describing, and creating information resources." The mission statement concludes with the statement: "We approach the above activities via the values and principles of librarianship." What is being evaluated or selected? When one scans the portions of the web site devoted to teens and youth, one finds headings in the former category for such topics as "Arts & Entertainment," "Dating & Stuff," "Health," and "Style." A quick scan of the resources included under these categories does not reveal references to some of the problematic websites that are at issue in the current case—visual images inappropriate for minors. Why not? If Janes does not subscribe to the standard of appropriateness for Internet resources, why does the IPL insist that it acts guided by professional values and principles? The Internet Public Library claims to, and actually does, select materials that are suitable for minors in a public library—even an *internet* public library. Selection according to content does still retain a place in the accumulation of materials that public libraries gather for their patrons—including minors.

11. Anne G. Lipow. According to the biographical information that Ms. Lipow submitted with her report, she makes no claim to have direct public library experience nor has she taught or supervised projects related to collection development for public libraries. Ms. Lipow was a practicing librarian after the receipt of her M.L.S degree from the University of California, Berkeley—most of the time at her alma mater, a major *research library*. Academic and research libraries have very little in common with community-oriented public libraries. Lipow is an *independent entrepreneur* and publisher who promotes more extensive use of the Internet among libraries of all types. Like Janes, her primary interests, and her livelihood, are centered on the digital environment, according to her biographical statement.

12. The main conclusion of the Lipow expert report is that because of the advent of the Internet and the alleged elimination of concerns of libraries related to financial support and physical space, there is really no difference any more between public libraries, academic and research libraries, and very specialized libraries (p.4). A further conclusion is that an ideal situation would be for any and every searcher to seek any information without a mediator of any kind (p.4). In other words, with regard to Internet resources, no differentiation may, or should be made, between types of libraries, and it is incorrect to argue that librarians should not be involved in selection activities in that medium. The need for even the Internet Public Library, promoted by Janes, is an anomaly, according to Lipow's presupposition. Though her conclusion has little to do with her examination of websites, she, too, used a database contained on a CD furnished by the

plaintiffs' expert, in this case an apparently pre-selected group of 204 sites. There is no indication of the random nature of this selection.

13. Of the group of sites examined, all met the "criterion" of "useful information for someone" and "should be accessible to children." 200 sites fell into three categories—A, B, and C—that correspond generally to what amounts to core sites, marginal sites, and debatable sites. The third category, C, consisted of sites that a library "might not choose" for a variety of reasons, but that patrons doing comprehensive research analysis, etc. might be referred to by librarians. That is, these were sites that "fall outside libraries' collection policies or standards for inclusion" but would be helpful for persons with special needs. An example or two of each type accompany the report, however the examples for type C seem of remote value to patrons, by Lipow's own evaluation. If these examples are indicative, one can only wonder why 74 sites in this category (one third of the total) were deemed acceptable. Here Lipow reveals her presupposition that hypothetically any information of any kind is useful for someone, sometime, somewhere—so it should be collected. (Incidentally, she found only one site "inappropriate for kids"—category D—and that site itself warned those under 18 to not continue further.)

14. Lipow asserts in her concluding paragraph both the presuppositions and the conclusions supported by her and her colleagues—who are promoting the Internet as the new information environment that challenges all the selection standards of the past. The Internet, according to Lipow, apparently defies, and should continue to defy, all efforts to manage it for desirable

ends. The argument is that the Internet has blurred, if not obliterated, the differences between research, school, special and public libraries—as far as the user is concerned. The first erroneous implication of this is that space is no longer an issue, assuming that that was a primary hindrance to the well-selected library. The second erroneous implication is that no mediator of any kind should be needed or even desirable in helping users find information, assuming that all users (including minors) require unlimited access to any type of information that is available anywhere on the planet. This assumption is particularly ironic, given the fact that Lipow has been employed in, and lectured on, reference services. Together, these ideas, carried to their ultimate ends, run counter to the historic mainstream of American librarianship. In short, the conclusions of this report could have been written without any study, because they are not based on meaningful selection principles employed by most public libraries—but rather on the presuppositions of the witness.

15. In reality, it is inconceivable that even unlimited space and funds would eliminate the need for public librarians to select materials that are congruous with the collection development policies that they and their communities have constructed. To assume otherwise is a false assumption that portrays the weakness in the argument. Such a notion is clearly antithetical to the principles of library information and reader's advisory service that maintain that one of the chief professional responsibilities of librarians is to save the time of users and ensure that they do not waste their time in unproductive material. Patrons have come to trust the informed judgment of librarians to have culled for them

from the vast universe of information those materials that will be most useful and productive for them to use.

16. The benefit to patrons, especially children and youth, in community libraries in this environment is not at all clear. According to Lipow, public library patrons must avail themselves of the full impact of the Web without assistance, whether they want to do so or not. Library professionals who do not fully embrace the historic role of public libraries, and the collection development responsibilities they bear, unfortunately can succumb to behaving like uncritical enthusiasts for unbridled access to material of any kind—even to that which the overwhelming majority of communities think should reasonably be limited. Although they see themselves in a heroic role, these information libertarians are running against community interests. They seem to be advocating for public libraries something that would be comparable to forced removal of protective fences around swimming pools that prevent those unable yet to swim from being hurt or worse—and accept liability for their welfare. Will Manley, "Good Fences Make Good Libraries" has written on this point recently in a respected ALA selection journal (*Booklist*, November 1, 2001, p. 446.) (attached as Ex. 1).

17. Michael Ryan. Dr. Ryan is a historian, bibliographer, archivist, and special collections specialist who has spent his career in *research libraries* and makes no claim to have had public library experience; nor has he taught or supervised projects related to collection development for public libraries. His professional and scholarly involvements include serving on the editorial boards of journals, such as *College & Research Li-*

braries and *Rare Books & Manuscripts Librarianship*, and he currently serves as director of the Rare Book & Manuscript Library, University of Pennsylvania. In short, Ryan is an academic librarian who administers unique and specialized materials available for research purposes.

18. However, although Ryan possesses credentials for the field in scholarly, research librarianship, his expertise and experience do not extend to the issues that are relevant to collection development in public libraries. Thus, he has little expertise to evaluate sites relating to these format and content related materials. What are legitimate resources for highly specialized collections designed for research are surely not the kinds of materials that one currently finds in public libraries.

19. The main conclusion of the Ryan very brief expert report is that all the blocked sites that he examined "are legitimate reference and information sources providing a variety of information and content for constituents" (p.1). Ryan lists the categories into which he classified the sites—"group or topic relevance, general usefulness, focus, and transparency." He concludes by saying essentially that all of these sites contain information of some sort and could be accessed from an unfiltered public library, thus he sees no reason for filtering them. In other words, since these sites are all findable from equipment without blocking mechanisms, they are all legitimate. This non-conclusion, that all sites have information that someone might find, is a meaningless statement in the discussion of collection development in public libraries.

20. Based on Ryan's review of the 200 plus allegedly blocked web sites assigned to him by the plaintiffs' expert, he concludes that "all of the blocked sites are legitimate reference and information sources providing a variety of information and content for constituents." From the criteria Ryan uses in his evaluation—"group or topic relevance, general usefulness, focus, and transparency"—and the context in which he evaluated the sites—his own experience—all one knows is that these sites contain information. One can assume under this definition that there are no sites—and by extension, that no sites even exist—that do not contain information of some sort. This logic does not help clarify anything.

21. The final sentence of his concluding paragraph states that "The nature and spectrum of information represented on these sites is consistent with the nature and spectrum of information contained in and accessible from a public library." Ryan appears to agree with Lipow that there is no distinction between public and research library; public libraries become simple connecting points to the Internet. Surely there are vast differences in the clientele and the collections of community public libraries serving a general population and the very specialized users of comprehensive and exhaustive research libraries that Ryan has served. Yet, despite his single mention of the public library, there is nothing in this paper to indicate that Ryan seriously considered the unique role of *public* libraries in serving the needs of the members of the community in which they are located, including children and youth. In Ryan's report, all libraries are treated as the same; there are no distinctions to be made.

22. Summary Comments. Each of the expert witnesses focuses on blocked sites as delivered to them in a database provided by the plaintiffs' expert. None of the expert witnesses acknowledge that currently filtered sites can be freely unblocked or that filtering devices can be disabled by professional library staff members. This is a procedure for dealing with the electronic universe that compares with the kind of decisions that librarians make with regularity with regard to other information media. Materials, such as books, records, etc., need to be individually selected and require professional judgment to ensure maximum value. Likewise, information on web sites that are not selected requires evaluation and decision as to its suitability to the community's users. (Approval plans from library wholesalers work something like this. The library receives items based on its collecting profile, with the provision that it may return to the publisher items that it does not want to acquire.) For the profession to do otherwise would be a departure from common practice of librarians for a century and a half. If selection of materials served the public library's community well in the past, then in the Internet environment the use of blocking and unblocking sites may serve the same purpose and counter the effects of overblocking. The historical record is clear: The ability of librarians with the expertise to select quality materials has been viewed as a critical professional responsibility that has been expected by communities supporting their public libraries.

23. An analogy is useful here. From time to time librarians re-evaluate materials (e.g. books and journals) that they had not selected initially, when a case is made that a work will be appropriate for a public

library collection and meet the information needs of community members. Likewise, a librarian who is conscientiously responsible to the needs of the community will unblock a site that was previously overblocked, if need and appropriateness are indicated. Both of these examples are a normal part of the ongoing evaluating and management of collection resources. Both involve sensitivity to available resources and expressions of community need. Content considerations are important to librarians and the community alike. For a century and half this relationship has been built on developing trust and respect for common values in the community.

24. In summary, all three expert witnesses agree that there are selection criteria of some sort for library collection development, either explicitly or implicitly—Janes looks for "experienced" judges (p.4), Lipow mentions "quality and authority" (p.2), and Ryan refers to "legitimate reference and information sources" (p.1). These admissions support the principle of the selection role of librarians—particularly those serving public libraries. However, while the expert witnesses affirm the professional librarian's classic selection functions, on the one hand, they seem to be saying that the Internet as a collection of web sites should not be subject to the same standards used to the present for other types of materials—even though generally comparable methods for doing so exist. In their view, the Internet is untouchable. This is a contradictory position that flies directly in the face of what public librarians concerned about the enrichment and enlightenment of their communities have undertaken for generations.

25. The propositions of the expert witnesses—that one library cannot be differentiated from another; that the least possible, and preferably no selection and mediation is best; and that any information of any sort will be of some use to some one, in some place, and at some time—are inconsistent with the selection roles that public librarians play in civilized society

The foregoing is a complete and accurate report of my expert opinions in this matter.

30 November 2001 _____

DONALD G. DAVIS, JR.

[D. Ex. 189]
[Expert Report of Blaise Cronin]

The Children's Internet Protection Act: Expert Testimony of Professor Blaise Cronin, PhD, DSSc, DLitt (h.c.), FRSA, FIM, FIInfSc, FLA

1. Preamble

1.1. I write as the Rudy Professor of Information Science at Indiana University, where I have been dean of the School of Library and Information Science for the past ten years. Prior to that I was head of the Department of Information Science at the University of Strathclyde in the U.K., where I held the Chair of Information Science. I have authored or edited some 300 monographs, research articles, technical reports, conference papers, book chapters, and other publications dealing with many aspects of library and information science theory, practice, and policy. I also have extensive international experience, having worked as a consultant for organizations such as the World Bank, Commission of the European Communities, UNESCO, and British Council. By way of illustration, I was a member of the team commissioned by the Department of National Heritage that carried out the *Review of the Public Library Service in England and Wales*, one of the largest ever surveys of public library use and attitudes [1]. Recently, I have studied the market for digital pornography in the U.S. [2]. My curriculum vitae is attached.

1.2. For the last 16 years I have been responsible for directing graduate programs designed to educate librarians, information scientists, and sundry other information professionals. As a result, I have a broadly developed sense of the trends, contemporary and his-

torical, relating to the education and training of professional librarians, particularly in the U.S. and U.K. I also have considerable first-hand familiarity with the various professional bodies associated with the library and information professions in both countries (e.g., The American Library Association, American Society for Information Science and Technology, Association for Library and Information Science Education, Library Association, Institute of Information Scientists).

1.3. Indiana University's School of Library and Information Science (http://www.slis.indiana.edu/), which offers, inter alia, master's degrees in both Information Science and Library Science and a Ph.D. in Information Science, is one of the top-ranking programs of its kind in North America, with almost 6,000 graduates employed in virtually every state and in many foreign countries. In April 2000, the school's faculty was rated #1 overall in the nation for its multi-year scholarly productivity and impact [3]. For the last 50 years the school's MLS (Master of Library Science) program has been continuously accredited by the American Library Association (ALA), the body principally concerned with the formal education of professional librarians in this country.

2. The Children's Internet Protection Act and the Practice of Librarianship

2.1. In this expert witness report I wish to address a number of issues relating to the substance of the Children's Internet Protection Act (CIPA) and, more specifically, to show that the use of a "technology protection measure," as proposed in the Act, is consistent with the traditional principles and prevailing practice of public librarianship in the U.S. More specifically, I shall show that the idea of filtering materials which are

harmful to minors_"any picture, image, graphic image file, or other depiction that (A) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion; (B) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and (C) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors," to use the language of the CIPA_is in keeping with the historical purpose of the public library and the enduring professional ethos of the American library profession. For convenience I'll use the term "pornography" throughout this report to connote the full spectrum of sexually explicit materials.

2.2. First, I'll outline the marketplace for digital pornography in order to demonstrate the nature and scale of the problem facing public libraries. Second, I'll address the related practices of selecting, filtering, and labeling library materials, and show how the adoption of the CIPA is consistent with long-established conventions in professional librarianship as they relate to the handling of pornography. Third, I'll illustrate some basic similarities between the functions performed by filtering software, as proposed in the CIPA, and the traditional bibliographic access systems (e.g., indexes, catalogs) used by librarians. Fourth, I'll show how the CIPA is consistent with existing procedures and practices for handling print-based pornographic materials in public libraries.

3. The Market for Online Pornography

3.1. The amount of pornographic materials freely available via the Internet and World Wide Web is

enormous. The dramatic growth in online pornography and the increasing accessibility of such materials via networked computers in public libraries are creating a very real problem for librarians, and diverting professional time, attention, and resources from mainstream tasks. The CIPA is an attempt to provide the library profession with a pragmatic solution to the problem of minors' exposure to sexually explicit materials. Common sense tells us that allowing children to have unfettered exposure to pornography is neither professionally nor socially responsible. The CIPA provides librarians with a means of dealing with this complex challenge in a way that is consistent with professional practice.

3.2. The Children's Internet Protection Act is a direct response to the dramatic growth in publicly accessible pornography facilitated by the widespread diffusion of internetworking technologies, notably the World Wide Web. For detailed background information on these and related trends, the reader is referred to the sources cited in [2] and the references contained therein. The remarks that follow are based in large measure on these two texts and their supporting references.

3.3. Estimates of the "legal" sex industry worldwide, which includes magazines, striptease clubs, phone sex, videos, and web sites, is about $60 billion annually, or more than twice Disney's global earnings from all of its diversified businesses. The U.S. probably accounts for $15 billion of the total, of which, in turn, video sales and rentals (roughly 700 million per year) alone account for $5 billion. To put things in perspective, revenues for sex goods and services are considerably larger than all movie box office receipts in this country. The adult entertainment sector, to use the favored euphemism, is also more economically significant than all of the per-

forming arts, or, for that matter, professional sports such as football and basketball. In the U.S., commercial web-based pornography is estimated to be generating annual revenues in the $1 billion range; additionally, it is believed that there are more than 250,000 free web sites devoted to pornography. Pornography is the one form of Internet content that seems (almost) recession-proof.

3.4. Daily, millions of Americans surf sex sites (free and pay-for-view) from home, work, and other locations. Evidence of this activity comes from commercial market research firms like Nielsen and Jupiter Media Metrix which measure in-home use of adult entertainment sites on the web, and from other companies, like the portal Sextracker (http://www.sextracker.com), which provide publicly accessible (longitudinal) data on the hit rates of the sites they track.

3.5. The Internet and World Wide Web are facilitating new means of distributing and consuming pornographic goods, and also creating new computer-mediated environments (chat rooms, web rings) and novel experiences (public voyeurism, interactive sex) for the global market. The social ramifications of these trends are likely to be complex: for instance, there is evidence that online sex addiction is on the rise, with an estimated 200,000 cases in the United States. As the percentage of U.S. households with access to the Internet continues to rise (51% in August 2000, according to the Department of Commerce), so, too, does the number of public libraries and schools offering online connectivity. Today, virtually every public library in the U.S. is wired, and every day, millions of U.S. children routinely access the Internet and World Wide Web, from public and pri-

vate terminals located in homes, schools, libraries, and elsewhere.

3.6. Even as the number of children online rises, the amount of freely available accessible, web-based pornography continues to grow. It is estimated that 100,000 web sites contain child pornography [4]. Quite apart from the numerous recorded incidents of children accessing digital pornography in public libraries across the nation, there is the well-documented risk of minors being preyed upon in online chat rooms [5, 6]. The significance of this phenomenon has been powerfully described by Andrew Vachss, an attorney, novelist, and life-long library advocate, in his 1999 testimony to the National Commission on Libraries and Information Science (NCLIS) [7, pp.10-11]:

> You know what the greatest threat to vulnerable children is? It is the very real potential for enticement. Child pornography has always existed. Predatory pedophiles have always lurked outside playgrounds and inside organizations. But the Internet permits, in its interactive form, access to children that would not be available to them otherwise . . . As a research tool, I think the Internet has much to offer. But "chat" is not research. And while it is most certainly a form of "speech," the enticement of children for the sexual gratification of an adult is not a protected form of speech.

3.7. The intersection of these trend lines has manifest public policy consequences for institutions where unfettered access to pornographic materials and potential exposure to pedophiles pose credible concerns. Given the vast amount of digital pornography freely available in the public domain, it would seem, at the very least,

commonsensical to consider how children's risk of exposure to such materials in libraries might be minimized.

3.8. The specific goals of the Children's Internet Protection Act are congruent with the historical assumptions underpinning the practice of librarianship and also the education and training of professional librarians in the U.S. [8] Education and self-improvement have always been cornerstones of the public library movement in the US and other nations, and the CIPA will enable librarians to fulfill their social mission with greater assurance and effectiveness in the evolving digital environment.

4. Selecting, Filtering, and Labeling Library Materials

4.1. The selection of materials and building of collections are the defining tasks of professional librarianship. Selection and filtering have a reciprocal relationship. To argue otherwise is disingenuous. From the patron's perspective, the net effect of an item not being added to a library collection is no different from its being consciously excluded by a librarian. The same holds with regard to de-selection (the systematic removal of items from a collection), otherwise known as de-accessioning, de-acquisition, or weeding. De-accessioning is also a form of filtering. This, of course, is not quite the same as saying that items which are not selected (or are de-selected) are always purposefully, excluded on the grounds of content, since most libraries can afford to purchase (and/or store) only a fraction of what is published, a point made by the late Lester Asheim in his paper, *Not censorship but selection* [9]. But filtering is an inescapable fact of library life.

4.2. Librarians select materials; librarians filter materials. They are trained and remunerated to do so. Over

the years, librarians have often been referred to as "gatekeepers," in recognition of their role as filters between readers and the mass of published material in the public sphere. Increasingly, librarians have been turning their attention to the selection (and filtering) of digital materials. The principles of selection and collection development are today being applied to a wide variety of web-based resources. Because many web sites contain sexually explicit materials, the library profession is confronted with a fresh challenge for which new tools, such as the technology protection measures proposed by CIPA, will be required. Faced with an explosion of pornographic materials in cyberspace, librarians will surely benefit from the use of filtering software in the exercise of their core professional functions.

4.3. Labeling, in its various guises, is an absolutely essential and pervasive activity within professional librarianship. The practice of librarianship is (and always has been) predicated on labeling: from the classification numbers on the spines of books to the broad subject headings (history, biography, fiction, etc.) used to group public library materials for patron convenience. While rating systems for movies or television programs, like library classification schemes and cataloguing systems, may be less than perfect instruments, they have evident social utility and a seriousness of intent.

4.4. Categorizing and labeling are fundamental cognitive processes: they enable us to make sense of the world. We instinctively categorize objects, behaviors, events; and we (in the form of the federal government) label foodstuffs, prescription medicines, and, of course, ourselves (in the context of the decennial census). No one denies that labeling systems, whether it's the Dewey Decimal Classification (DDC) scheme used in

libraries or the categories (e.g., race) employed by the U.S. Census Bureau, are, to resort to the prevailing jargon, anything other than socially constructed. But that is a far cry indeed from saying that they are, as some would have it, inherently, or invariably, "prejudicial" [10].

4.5. Librarians routinely apply labels and rating systems in the exercise of their craft. Children's books are rated in terms of their readability, for example. *School Library Journal*, a leading selection tool for professional librarians, might label a book as * PreS-Gr 3, which means that it is "excellent in relation to other titles on the same subject or in the same genre" and suitable for children in preschool through Grade 3. Logically, there is no reason why one should object to similar labeling of pornographic materials, be they web-based or printed, or to the use of filtering software to identify and screen out certain categories of sexually explicit materials. With CIPA, librarians will still be in a position to evaluate and categorize digital resources: the technology supports rather than displaces the librarian. And, of course, many librarians are already voluntarily using commercial filtering software to assist them in their work.

4.6. Librarians reflexively label materials (e.g., as juvenile nonfiction, or biography) before adding them (or not) to their collections. Once added to the collection they are again labeled (e.g., catalogued and/or classified). In some cases, the labeling is implicit rather than explicit, as when materials are put on restricted access, or otherwise segregated from the mainstream collection—a common tactic for handling pornography in public libraries. Librarians use magazines such as *Library Journal* or the *Horn Book Guide* to read reviews

of new books (reviews often written by other librarians) and then make a decision whether or not to purchase a copy. There are also various specialized selection tools and bibliographies to draw upon, such as *Sensitive Issues: An Annotated Guide to Children's Literature K-6* and *Multicultural Picture Books: Art for Understanding Others*. Librarians' selection and de-selection decisions are filtered though reviews, their own subject knowledge, exposure to collection development guidelines, and their adherence to community standards.

5. Filtering Software and Bibliographic Access Systems

5.1. It is misleading to single out filtering software for criticism, or to refer to the Children's Internet Protection Act as imposing "dramatic, federally mandated speech restrictions on public libraries and schools across the country" [11, p.7]. Such a standard would require that we acknowledge the analogous limitations of traditional subject cataloging and indexing tools and hold them to account in like fashion. Although the bibliographic tools employed by librarians have become progressively more sophisticated over the years, their inherent limitations are widely acknowledged.

5.2. Library users are occasionally frustrated in their attempts to identify, access, and retrieve materials, but these frustrations are not the result of the library profession consciously trying to abridge patrons' First Amendment rights. They are a natural consequence of the limitations of the access tools (catalogs, indexes, etc.) that are used day in day out by librarians and library patrons everywhere. Library indexing and access systems, as much as commercial search engines or filtering software, are inherently imprecise instruments. The net effect of such imprecision is that sometimes documents are unintentionally 'lost' to the user, or the documents which are found have little to do with the subject for which information is being sought. This is not materially different from the claimed effects of filtering software (viz., under-or over-blocking). It is unreasonable to hold filtering software to a higher standard than the other bibliographic access tools used by professional librarians in the daily exercise of their craft.

5.3. In an important sense, much of the technical discussion surrounding filtering software is beside the point. Library patrons access information using a rage of indexes, catalogs, online databases, and web search engines, all of which, as with filtering software, have well-documented shortcomings. Various studies of search engine performance have shown that even the best engines find only a relatively small amount of the information available on a given topic. In their highly cited study [12], published in *Nature*, Steve Lawrence and C. Lee Giles found that the relative coverage of eleven commercial search engines ranged from a high of 35% to a low of 5% of the web, based on a sample of more than 1,000 queries. In sum, much of the web remains uncovered even by the best search engines, and patrons won't always get what they need or want. By way of comparison, the amount of relevant information blocked by filtering software is minute in relation to the amount un-indexed by commercial search engines. David Burt examined the Internet access logs of three public libraries and concluded that "99.93-99.99 percent of the time, the filter did not block innocent sites" [5, p.1], while David Biek's recent statistical analysis of filtering software at Tacoma Public Library found a "remarkable degree of accuracy in the operation of the

CyberPatrol software." The degree to which the intercepted URLs conformed to the library's filtering policy was in the range 95.6%-98% [6]. In other words, the filtering software blocked hardly any sites which should have been freely accessible to the library's patrons.

5.4. Within librarianship a standard performance measure is the relation between recall and precision, namely, the choice between locating much of the broadly relevant information on a topic versus finding fewer but more useful documents. Simply put, the trade-off is between breadth and specificity. Thus, library patrons won't necessarily get everything they want when they search library files. And the reason is simple. Indexing is an art not a science. No two human indexers will come up with exactly the same set of index terms for a group of documents (or other media). This variability means that some documents will be mislabeled (from the patron's perspective), and, thus, effectively denied them. Labeling—the essence of indexing, which, in turn, determines search effectiveness—is an inherently imprecise activity. Many studies have documented how readers fail to find what they are looking for when using traditional library catalogs [13], but we certainly don't invoke censorship as the explanation for aborted or futile searches. The situation with filtering is similar. When filtering software is used, the first step is to label or categorize web sites. Whether this process is performed by human reviewers and/or intelligent software (e.g., neural nets) the resultant categorizations may sometimes be imprecise. This is only to be expected: the categorization of web sites, like the indexing of documents or the cataloguing of books, is necessarily an imprecise, and residually subjective, activity.

5.5. It does not make sense to object to filtering software on the grounds that the underlying algorithms are proprietary and thus beyond the control of professional librarians. Librarians can retain remote control over the "black lists" or "white list" used to define the filtering parameters. They can develop their own labels (e.g., adult entertainment) for categorizing web sites or use existing categories developed by a software vendor, such as CyberPatrol. In the latter case, they will be able to access the list of criteria used by the company's reviewers [14]. Additionally, librarians can have password-protected access to the database which allows them to update or edit the lists. And there is a third option: librarians could develop their own filtering software. Many recent library school graduates have highly developed technical skills (from computer programming through systems design to usability analysis) and there is no reason why libraries could not develop their own filtering software, if they so wished. Over the years, libraries (either individually or in collaboration) have developed a variety of automated systems in-house (e.g., for cataloguing and circulation) and public libraries could quite conceivably develop their own filtering software independently or collaboratively. Buyer groups, consortia, and coalitions are increasingly popular within the library community as a means of achieving common objectives, including, of course, cost containment. Many library cooperatives are involved in the development of information systems and the cataloguing of resources, both printed and electronic [15, 16, 17].

5.6. The Online Computer Library Center (OCLC), the world's largest centralized cataloguing and bibliographic support service with tens of thousands of li-

brary members, has in recent years initiated a project, Cooperative Online Resource Catalog (CORC), to selectively catalogue valuable web resources [18]. The following extract gives a sense of what is involved. It is taken from the CORC web site, which is available at http://www.oclc.org/corc/.

> The OCLC Cooperative Online Resource Catalog service is a metadata creation system for bibliographic records and pathfinders describing electronic resources. You choose which electronic resources to catalog: local and web-based. CORC helps you provide your users with well-guided access to electronic resources. In short, CORC increases the value of the web for your library and its users, giving you the tools you need to organize, select and describe electronic resources. OCLC relies on the expertise of librarians to select valuable resources. The result is a diverse collection, immediately useful to member libraries, as well as local and global users.

5.7. The CORC project demonstrates that librarians, working in collaboration, can make meaningful efforts to identify, catalogue, and provide their patrons with access to web-based materials deemed to be of potential value. T hus, a patron using the library catalog may be directed seamlessly to both print and digital resources. The traditional collection development skills of librarians are, in fact, being applied increasingly to the identification and recording of significant web-based resources, and similar collaborative efforts can be envisaged in respect of digital materials for children (e.g., *The Scout Report*, available online at: http://scout.-cs.wisc.edu/about).

5.8. To claim, as has been done, that the use of proprietary filtering software is tantamount to outsourcing, and, as such, somehow unacceptable to the professional library community, is baseless. First, some libraries do contract out operations to commercial vendors, or rely on buyer-groups or national library supply agencies rather than perform certain functions internally and independently. In fact, outsourcing in one form or another, is by no means uncommon in libraries of different kinds worldwide [16]. OCLC (see section 5.6) is an excellent illustration of how a core professional activity (viz., cataloguing) can be contracted out to a centralized agency with quality and efficiency gains for the participating libraries. Second, even if the development of the filtering software is contracted out, librarians still retain local control and have the option of disabling the technology protection measure for certain categories of use and also of unblocking sites which have been erroneously filtered (see, for example, the Internet filtering policy of the Jacksonville Public Library, available online at: http://jpl.itd.ci.jax.fl.us/-English/library.filter).

5.9. Permitting patrons to view pornography on library computers may have the effect of denying other patrons the opportunity to access bona fide materials. Given the high demand, and finite budget, for computers in libraries, it follows that scarce resources are being misused and legitimate use of community resources is being prevented in at least some cases. Computing facilities, like the book fund or shelf space, are finite resources. Where Internet access is maximally permissive, patrons with legitimate interests will inevitably be disadvantaged on occasion. Imposing time limits on use the use of computing facilities does not, of course, ad-

dress the root problem; it merely increases the bureaucratic overhead. By permitting pornography to be viewed on their premises, public librarians are constraining those patrons interested in accessing educational and information resources. The peculiarity of the situation is underscored by the fact that some patrons use the library's computers to visit sex-themed chat rooms, a conversational medium. Since libraries do not provide patrons with free phone services, one has to ask why another communicative medium, the chat room, is privileged in this manner.

6. Printed Pornography in Libraries

6.1. The technology protection measures proposed by CIPA do not pose a de-skilling threat to librarians. The adoption of filtering software by libraries certainly does not create a potential case of technological substitution; rather, librarians can define (and refine) the criteria and categories used by filtering software, and, moreover, they have the ability to disable the filtering software in cases where, to quote again from the Act, "access for bona fide research or other lawful purposes" is warranted. It is worth noting in this context that today's professional librarians have the technical skills and experience to interact intelligently with vendors, deploy sophisticated software packages in their libraries, manipulate existing software and propose and even institute technical modifications to both off-the-shelf and customized products.

6.2. Very few public libraries acquire pornography for their print collections. Moreover, librarians who claim that the relative under-representation of pornographic materials in their collections is simply a function of finite acquisition budgets are being disingenuous. Pornography, as a subject, is significantly underrepresented in the holdings of American public libraries as a result of choices (filtering decisions) made daily by professional librarians. Logically, therefore, one would expect professional librarians to make similar filtering choices in respect of digital pornography. Specifically, one would expect librarians to systematically filter pornographic materials that might otherwise be available to their patrons via library computers with Internet connections. Not to do so would be to operate a double standard.

6.3. Content-neutrality with regard to pornography is a convenient myth. *Playboy* magazine is a well-known example of the soft porn genre, yet even it has relatively low salience in public libraries. A recent (9/7/01) check of the OCLC WorldCat database (see: http://-www2.oclc.org/) revealed that 428 of that organization's roughly 40,000 member libraries worldwide had catalogued the magazine. More sexually explicit material is even less commonly available—a recent (10/11/01) search revealed that only eight libraries held *Hustler* magazine. Simply put, public libraries have not traditionally acquired pornographic materials, of whatever kind, for their patrons.

6.4. In the early 1990s, Leigh Estabrook and Chris Horak [19, p.53] conducted a survey of both public library patrons and library personnel. Of the librarians surveyed, only 30% thought *Playboy* and *Penthouse* should be available to all patrons, while 37% of librarians said such magazines should not be in the library at all. [By way of comparison, 70% of library users were opposed to the presence of such magazines in libraries and only 3% would make them available to all users.] Historically, pornography has had no place in American public libraries, nor, to the best of my knowledge, has a

case ever been made in the curricula, textbooks, or manuals associated with collection development for the admission of such materials into the tax-supported public library system.

7. Conclusions

7.1. Collection development, "the librarian's raison d'être" [20], does not begin at the library door and end at the computer screen, as far as pornography or any other class of material is concerned. Specifically, there is no historical precedent or contemporary justification for librarians to entertain pornographic materials in their collections. For instance, the Westerville Public Library "deems as inappropriate" the online accessing of "pornographic materials and sexually explicit graphics" [21]. The wording of Tacoma Public Library's Internet use policy is even more specific in this regard [22]:

> The library reserves the right to apply hardware and software control mechanisms to ensure that information provided through its Internet services is consistent with its mission and collection development policies. The Library's acquisition of Internet materials to be made available to Library patrons does not include graphic materials depicting full nudity and sexual acts which are portrayed obviously and exclusively for sensational or pornographic purposes . . . A user may not use the computing resources of the Tacoma Public Library for any illegal or unauthorized act or in violation of any library rule or policy or of any local, state, or federal laws or regulations.

7.2. Web-based resources can be subjected to the same selection, de-accessioning, and filtering criteria as print materials. And they can be labeled (or categorized), as is the case with print materials. Opposition to the CIPA, based on the notion that the management of digital resources is somehow fundamentally different from the management of print materials, is both professionally inconsistent and socially myopic. In my considered opinion, the Children's Internet Protection Act will enable librarians to perform their professional functions more effectively, and in a fashion congruent with established norms and practice.

8. Personal Statement

8.1. I have not provided expert testimony in any cases within the past four years.

8.2. For my services in the present litigation I am being reimbursed by the Department of Justice at the rate of $100 per hour.

8.3. A list of my publications for the last ten years can be found in the attached curriculum vitae, which includes a comprehensive list of my writings.

Notes

1. The Association for Information Management (1995). *Review of the Public Library Service in England and Wales . For the Department of National Heritage. Final Report*: London: Aslib (Published with the permission of the Controller of Her Majesty's Stationery Office).

2. For further information, see the following peer-reviewed journal article: (a) Blaise Cronin and Elisabeth Davenport. (2001). E-rogenous zones: Positioning pornography in the digital economy. *The Information Society*, 17(1), 33-48; and also (b) Blaise Cronin. Uporn my word. In: *Professional Provocations: From the Margins of Libraryland*, Scarecrow Press (forthcoming). The statistics quoted in the present report, and cited in those publications, have been garnered from a wide range of secondary sources. It is important that they be treated with caution. Measuring the web and quantifying consumer behavior in cyberspace are technically complicated and inherently inaccurate activities. Nevertheless, the numbers are plausible leading indicators of a significant social trend propelled by the rapid diffusion of internetworking technologies. I should here acknowledge feedback and insights gained recently from academic colleagues following public presentations on this topic at Indiana University Bloomington, the Royal Melbourne Institute of Technology (Australia), Leeds Metropolitan University (England), Manchester Metropolitan University (England), and Napier University, Edinburgh (Scotland).

3. John M. Budd (2000). Scholarly Productivity of U.S. LIS Faculty: An Update. *The Library Quarterly*, 70(2), 230-245.

4. Attributed to Kevin Bell, a spokesman for the US Customs Service. In: Eileen Gongora (2001). *Pedophiles Prey on Children via the Internet.* Available online at: http://www.starbanner.com/Tchild/internet-pretator517.shtml

5. David Burt (2000). *Dangerous Access, 2000 Edition: Uncovering Internet Pornography in America's Libraries.* Washington, DC: Family Research Council.

6. David Biek (2001). *Demographic Characteristics of Internet Users at the Tacoma Public Library with Special Reference to the Issue of Internet Pornography. A White Paper for the National Research Council Committee on Tools and Strategies for Protecting Kids from Pornography and their Application to Other Inappropriate Material on the Internet.* February 28, 2001. The data are to be found in the Endnote. Available online at: http://www4.nationalacademies.org/cpsma/cstb/-itas.nsf/238912d6ec6e95b4852566f2006da6f5/213b3f74b-045fcbe85256a0e0014ee14?OpenDocument.

7. Testimony of Andrew Vachss, included in: U.S. National Commission on Libraries and Information Science (1999). *Kids and the Internet: The Promise and the Perils.* An NCLIS Hearing in Arlington, Virginia, November 10, 1998. Washington, DC: NCLIS, 1998, pp.5-14.

8. For an example of these historical notions, see Melvil Dewey (1876). The profession. *Library Journal*, September 30, 1, 5-6.

9. Lester Asheim's paper is available online at: http://www.sils.buffalo.edu/faculty/ellison/Syllabi/580/NotCensor.html

10. For a comprehensive statement of the American Library Association's position on labeling, see: http://-www.ala.org/alaorg/oif

11. Daniel Mach (2001). Why filtering is unconstitutional: An update on the ALA's legal challenge to CIPA. *Freedom to Read Foundation News*, 26(2-3), 7-12.

12. Steve Lawrence and C. Lee Giles. (1999). Accessibility of information on the web. *Nature*, 400, July, 107-109.

13. Blaise Cronin (1978). *Catalogue Non-users: Their Characteristics and Attitudes.* London: The British Library Research and Development Department. BLRD Report No. 5452.

14. Deposition of Kevin Blakeman of SurfControl Inc. August 21, 2001, page 83, lines 7-13; page 138, lines 1-4.

15. Blaise Cronin (1998). Library and information science in context. In: Maurice. B. Line, Graham MacKenzie and Paul Sturges (Eds.). *Librarianship and Information Work Worldwide 1998.* London: Bowker Saur, 1-17.

16. James H. Sweetland (2001). Outsourcing library technical services_what we think we know and don't know. *The Bottom Line: Managing Library Finances*, 14(3), 164-175.

17. See, for instance: *Illinois Library Computer Systems Organization: ILSCO Report 2000-2001.* Available online at: http://www.ilcso.uiuc.edu/Web/About/-ar2001.pdf.

18. Information on OCLC and its portfolio of member services, including CORC, is available online at: http://www.oclc.org.

19. Leigh Estabrook and Chris Horak (1992). Public vs. professional opinion on libraries: The great divide. *Library Journal*, 117(6), 52-55.

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21. Available online at: http://www.wpl.lib.oh.us/library/Internet

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* * * * *

October 15, 2001

[Signed Blaise Cronin]

[D. Ex. 190]
[Rebuttal Expert Report of Blaise Cronin]

Expert Rebuttal Report
Professor Blaise Cronin, PhD, DSSc, DLitt (h.c.),
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1. I have reviewed the expert reports submitted by Dr. Geoffrey Nunberg, Dr. Joseph Janes, Ms. Anne G. Lipow, and Dr. Michael Ryan on behalf of the American Library Association *et al.* I shall begin my rebuttal by taking issue with some of Nunberg's key presumptions and conclusions and then proceed to address the three reports by Janes, Lipow, and Ryan, which, since they are virtually identical in purpose, methods and weaknesses, I shall treat together. Additional reference works that I have consulted are listed at the end of this report.

2. Nunberg's key point is summed up in the following assertion [p.62]: "It is clearly a mistake to judge that a filter is efficacious simply because it doesn't block the news, shopping, or information sources that people most frequently rely on, because the sites it incorrectly blocks are frequented less often than those it classifies correctly." The first part of this sentence contains a revealing and important observation. To be simple, he is saying that overblocking is not in fact a problem because in reality most of the sites people most frequently access don't contain materials of the kind likely to be excluded by filtering software. Or, to put it even more simply: overblocking is a non-issue. Nunberg's

objection to statistical reality (the second part of the sentence on p.62) is based on his attachment to an imagined, or hypothetical, world, a world in which filtering software is applied to all web sites, not just those actually used by library patrons. But let's put things in perspective: we simply don't know the size of the web, or, more specifically, how many sex sites exist. Indeed, Nunberg concedes this very point [p.65]. There are estimates, of course, but it is important not to confuse estimates with precise measurements. The bottom line is that since we don't *know* the dimensions of the web (or the proportion of cyber real estate devoted to pornography), we can only speculate, as Nunberg does, on the potential for misclassification and overblocking of legitimate sites *were* filtering software to be applied to the web in its totality. Speculation of this kind, though, is not especially helpful when dealing with the practical problem of pornography in public libraries.

3. Nunberg argues [pp.62-63], that misclassification rates would be higher *if* web users' searches were evenly distributed across the universe of sites, but that is neither the case, nor likely to be the case. The reality is that most web users access a relatively small number of sites with the result that the risk of misclassification and overblocking is consequently slight. In any event, additional quality control can be introduced into the filtering process by having, as Nunberg himself points out [p.63], "humans checking out the resulting classifications." This, of course, is a role which librarians are eminently qualified to

perform, given their extensive training in the application of collection development criteria. The realities of web use are revealed in the publicly available statistics. Web traffic, like so much else in life [e.g., 1, 2], is highly skewed. A small number of sites account for a large proportion of all visits. As Adamic and Huberman noted recently [3, p.56], "millions of users flock to a few select sites, paying little attention to millions of others." This kind of distribution is sometimes referred to by statisticians as a power law and by economists as a winner-takes-all-market [e.g., 3]. Nunberg [p.11] illustrates this phenomenon in Table 1. Simply put, 75% of all web traffic is accounted for by 5% of all sites. Generally speaking, web users—library patrons or others—concentrate their searching and surfing activities on a relatively small number of sites, such as ebay, Yahoo!, Disney, etc., a point made by Nunberg [p.11; p.61]. These kinds of mass appeal sites are not typically subject to blocking, since they do not contain sexually explicit content. Consequently, the degree of overblocking that occurs when filtering software, configured to block graphic sexual depictions, is used will be minimal. As Nunberg states [p.61]: "since none of these sites is likely to have been misclassified as "adult" . . . it follows that the vast majority of clicks will go to correctly classified nonadult sites." That is a statistical inevitability of the generalized web search patterns that are acknowledged to exist.

4. Nunberg [pp.16-18] also maintains that Internet filtering software is imperfect, whether text-

based, image-based, or based on human classification. In other words, it doesn't matter which of these you use, the results will be poor in terms of the overblocking of protected speech. The technical explanation, centering on the relationship between recall and precision, is provided by Nunberg in *Section VII, Evaluation of Filtering Software* [pp.57-64]. However, all library classification systems (automatic or manual) have recognized limitations, and readers routinely fail to find desired items when using traditional bibliographic retrieval systems. Filtering software is no different in that regard from conventional bibliographic systems whose shortcomings sometimes prevent library patrons from getting what they want or, alternatively, provide them with materials they don't want. In my opinion, it is unreasonable to hold filtering software to a performance standard that other conventional bibliographic tools do not meet and, moreover, are not expected to meet. Additionally, it should be noted that some of the workplace alternatives, both behavioral and instrumental, to the use of filtering software are themselves imperfect, if not, indeed, ineffectual. The tap-on-the-shoulder approach causes embarrassment to both the pornography-viewing patron and the superintending librarian (not to mention others in the vicinity), while Internet use policies tend to suffer from prolixity and ambiguity, which merely reduces their already limited effectiveness against determined patrons. In short, these kinds of approaches will sometimes result in under and over-enforcement,

just as filtering software results in under and overblocking.

5. According to Nunberg [p.20], who cites the deposition of SurfControl's Kevin Blakeman [4, p.140], the process of overriding/unblocking pages is time-consuming and complicated. Unfortunately, the actual views and experiences of librarians who use filtering software are not reported here. Presumably, the perceived difficulty is a subjective matter. On a related matter, it has been claimed that filtering software removes from librarians a key professional responsibility by effectively outsourcing a content selection function [5, pp.5-6]. In fact, the need for updating stop lists, unblocking sites, vetting new sites, etc. provides an important opportunity for librarians to apply their professional skills to the evaluation, selection, and management of digital content. Third, if the problem is, in fact, significant, then librarians could. as they often do in other regards, collaborate to develop a common filtering tool and shared classification/categorization capability, drawing upon distributed expertise available in libraries across the nation.

6. It is worth noting in this context that libraries in the U.S., in particular, have a strong tradition of collaborating, not just informally but through structured participation in consortia and cooperatives of many different kinds. The International Coalition of Library Consortia (see: http://www.library.yale.edu/consortia/) was established in 1997 and represents the collective

interests of 150 library consortia world-wide. Its creation reflects the importance of institutional collaboration within the library community. Of course, a library can belong to more than one consortium or buyer group, depending on its particular mission and the range of services offered by different consortia. Undoubtedly, the best-known example of a large-scale library cooperative is the Online Computer Library Center, Inc. (OCLC), a non-profit membership organization, based in Columbus, Ohio, serving more than 40,000 libraries in almost 80 countries. OCLC's services (see: http://www.oclc.org/about) include cataloging tools, reference databases, online searching services, resource sharing tools, preservation tools, and Dewey Decimal Classification. At the heart of the OCLC services portfolio is the WorldCat database which contains 46 million cataloging records and more than 827,000,000 location listings. Library cooperatives are not a new phenomenon. Palinet, a cooperative membership organization comprising 600 libraries of all kinds in Delaware, Maryland, New Jersey, Pennsylvania, West Virginia and neighboring states, was set up 65 years ago. Among its many services (see: http://www.palinet.org/services/infotech.htm), Palinet offers its members "comprehensive support for the planning, procurement, integration, and implementation of computer and communication technologies." There are also many state-level library cooperatives, such as the Michigan Library Consortium (see: http://www.mlc.lib.mi.us/), which offers its members software services and technical support. American public

(and other) libraries have a long tradition of co-developing resource-sharing facilities and technological solutions to better accomplish their common objectives, and there is no good reason why libraries cannot work collaboratively on the matter of filtering software development and evaluation.

7. The three reports by Janes, Lipow, and Ryan provide subjective evaluations of the content of a sample of purportedly blocked web sites. The evaluators offer their views on the appropriateness of the blocked sites for inclusion in library collections. By and large, they conclude that most of the content of the blocked web pages is suitable for inclusion in library collections. In making these determinations, they invoke criteria which range from the vague to the kind routinely used by collection development librarians. Janes's criteria [p.4] include "contains information similar to that already found in libraries" and "contains information a librarian would want in the library if s/he had unlimited funds to purchase information and unlimited shelf space." These are fuzzy criteria, markedly in contrast to the detailed guidelines suggested in the ALA's *Workbook for Selection Policy Writing* (see: http://www.ala.org/alaorg/oif/workbook _selection.html). Ryan [p.1] is more specific, invoking "topic relevance, general usefulness, focus, and transparency." Lipow's report [p.2] contains the most concrete criteria. She, for instance, explicitly mentions the quality, and reliability of information. She also cites the authority of the author and the non-objectionable character of the content under consideration for inclusion in a library's collection. And she is fully cognizant of the fact that professional librarians have "collection standards," standards which, one presumes, would be applied to digital materials, including pornography, just as they would to other content categories reviewed by librarians. By acknowledging that librarians objectively evaluate potential library materials, and by actually using such criteria, these experts powerfully reinforce my central contention that collection development is, indeed, a defining aspect of professional library practice.

8. In my view, the concerns raised in the reports relating to the potential for blocking useful sites are exaggerated, given the experts' failure to acknowledge the practical steps that librarians can take to unblock material using any of the leading filtering programs. Many of today's library school graduates, in addition to possessing the traditional skills and knowledge associated with collection development and other core professional functions, also have high levels of systems and computational expertise. One has only to visit the web pages of accredited library and information science schools across the nation (for a comprehensive list, see: http://www.alise.org/nondiscuss/schools.html) to appreciate the extent to which the contemporary library science curriculum is technologically-based, both in theoretical and practical terms. Furthermore, many of today's graduates don't actually work in libraries; their technical skills sets make them highly attractive to employers in the wider

information economy and high-tech sectors in particular. The popular stereotype of the librarian notwithstanding, library school graduates are often highly technically competent and extremely well-informed about developments in the information systems and computing arenas, a trend that has been widely commented upon in the general media (see: http:// www.usnews.com/usnews/edu/beyond/grad/gbmls.htm). Indeed, over the course of the last decade, library and information science schools have often been campus innovators in terms of pioneering information technology-based programs, applications, and awareness.

9. Reading these four expert reports might lead one to conclude that librarians are somehow helpless in the face of overblocking caused by filtering software. That would be a seriously misguided take on the situation. Many library school graduates are technologically proficient—and that proficiency is refreshed via the extensive array of professional development opportunities available within the profession—and even if not every public library in the U.S. is blessed with its own local technical guru, the wealth of technical talent distributed across the nation is quite extraordinary. There is no reason to assume that professional librarians cannot modify or refine categories, unblock sites, and work, individually or collaboratively, to enhance the performance of existing filtering software. Not only is the professional library community highly adaptive and technologically sophisticated but it also has a history of developing and sus-

taining successful consortia and collaborative ventures of various kinds. Indeed, there is no good reason why the library profession could not harness the distributed know-how within its own considerable ranks to develop, co-develop, or modify existing filtering software to better meet its collective needs, as noted in section 6 above.

* * * * *

The foregoing is a complete and accurate report of my expert opinion in this matter.

/s/ BLAISE CRONIN
BLAISE CRONIN November 30, 2001

Supreme Court U.S.
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No. 02-361

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

AMERICAN LIBRARY ASSOCIATION, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Sections 1712 and 1721(b) of the Children's Internet Protection Act (CIPA), Pub. L. No. 106-554, Div. B, Tit. XVII, 114 Stat. 2763A-335, provide that a library that is otherwise eligible for special federal assistance for Internet access and related services in the form of discount rates for educational purposes under the Telecommunications Act of 1996, 47 U.S.C. 254(h), or grants under the Library Services and Technology Act, 20 U.S.C. 9121 *et seq.*, may not receive that assistance unless the library has a policy that includes the operation of a "technology protection measure" on Internet-connected computers that protects against access by all persons to "visual depictions" that are "obscene" or "child pornography," and that protects against access by minors to "visual depictions" that are "harmful to minors." 47 U.S.C. 254(h)(6)(B)-(C); 20 U.S.C. 9134(f)(1).

The question presented is whether Sections 1712 and 1721(b) of CIPA induce public libraries to violate the First Amendment, thereby exceeding Congress's power under the Spending Clause.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are set forth in the jurisdictional statement.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (J.S. App. 1a-191a) is reported at 201 F. Supp. 2d 401.

JURISDICTION

The judgment of the district court was entered on May 31, 2002. A notice of appeal (J.S. App. 209a-211a) was filed on June 20, 2002. The jurisdiction of this Court rests on Section 1741(b) of the Children's Internet Protection Act, Pub. L. No. 106-554, Div. B, Tit. XVII, 114 Stat. 2763A-352, and 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 1, Section 8 of the United States Constitution provides that "[t]he Congress shall have Power to lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts

and provide for the common Defence and general Welfare of the United States." The First Amendment of the United States Constitution provides that "Congress shall make no law * * * abridging the freedom of speech." The pertinent provisions of the Children's Internet Protection Act (CIPA), Pub. L. No. 106-554, Div. B, Tit. XVII, 114 Stat. 2763A-335, the Telecommunications Act of 1996, 47 U.S.C. 254(h), and the Library Services and Technology Act, 20 U.S.C. 9121, 9122, 9133, 9134, and 9141, are reproduced in an appendix to the jurisdictional statement. J.S. App. 192a-208a.

STATEMENT

1. a. Congress provides federal assistance to public libraries for Internet access pursuant to two statutory programs. Under the Telecommunications Act of 1996, qualifying libraries, including public libraries, elementary school libraries, and secondary school libraries, are entitled to purchase Internet access and related services for educational purposes from telecommunications providers at discounted rates (E-rates). 47 U.S.C. 254(h)(1)(B). Discounts under the E-Rate program reduce the cost of Internet access and related services by 20% to 90%, depending on the extent of economic disadvantage in a particular location. See 47 C.F.R. 54.505. For the year ending June 30, 2002, libraries received $58.5 million in E-rate discounts. Jt. Trial Stip. para. 128. The E-rate program is administered by the Universal Service Administrative Company under the supervision of the Federal Communications Commission. 47 C.F.R. 54.701, 54.702.

Public libraries also receive federal assistance under the Library Services and Technology Act (LSTA), 20 U.S.C. 9121 *et seq.*, which was enacted, *inter alia*, "to stimulate excellence and promote access to learning and information resources" in libraries. 20 U.S.C. 9121(1). Pursuant to LSTA, the Institute of Museum and Library Services makes

grants to state library administrative agencies that have approved plans. See 20 U.S.C. 9133, 9134, 9141. Those grants may be used for, *inter alia*, "electronically linking libraries with educational, social, or information services," "assisting libraries in accessing information through electronic networks," and "paying costs for libraries to acquire or share computer systems and telecommunications technologies." 20 U.S.C. 9141(a)(1)(B) and (E). In fiscal year 2002, Congress appropriated more than $149 million in LSTA grants for state library agencies. Jt. Trial Stip. para. 185.

b. Aided by the E-rate and LSTA programs, libraries have increasingly provided their patrons with access to information from the Internet. By 2000, 95% of the nation's libraries had connected to the Internet. J.S. App. 36a. By connecting to the Internet, public libraries can provide their patrons with a vast amount of valuable information. But there is also an enormous amount of pornography on the Internet, much of which can be obtained for free using any search engine. *Id.* at 30a-31a. Some pornographic Web sites use innocuous names, such as www.whitehouse.com, increasing the likelihood that the site will be reached accidentally. *Id.* at 31a. Many other pornographic sites attach pop-up windows that make it difficult to escape the site. *Ibid.*

The availability of pornography on the Internet has created a serious problem for libraries. Libraries have found that patrons of all ages, including minors, regularly search for online pornography. J.S. App. 2a. Some patrons leave pornographic images on an Internet terminal so that the next user is immediately exposed to them. *Id.* at 38a. Others leave printed pornographic images at the library printer. *Ibid.* Still others engage in inappropriate conduct. *Id.* at 146a.

To address the problems associated with online pornography, many public libraries have installed filtering soft-

ware that blocks access to pornographic sites. J.S. App. 45a. Almost 17% of public libraries use filtering software on at least some of their Internet-connected computers, and 7% have filters on all of their computers. Library Research Center, Univ. of Ill. Grad. Sch. of Lib. & Info. Sci., *Survey of Internet Access Management in Public Libraries* (June 2000) (PX 38); J.S. App. 3a. A library that uses filtering software can set it to block categories of material, such as "Pornography." *Id.* at 50a. When a patron attempts to obtain access to a site falling within such a category, a screen appears that indicates that a block has occurred. *Id.* at 52a. A filter set to block a category such as "Pornography" may sometimes block other sites as well. To minimize that problem, a library can set its filtering software to prevent blocking material that falls into categories such as "Education," "History," "Medical," and "Text/Spoken Only." PX 66C, at 7-8. A library also has the flexibility to add or delete specific sites from a blocking category. J.S. App. 52a. Anyone, including Web site owners, can ask companies that furnish filtering software to unblock particular sites. *Id.* at 53a.

c. The problems associated with the availability of online pornography at public libraries also came to Congress's attention. Congress became concerned that the Internet assistance it was providing to libraries for educational and informational purposes was facilitating access to illegal and harmful pornography. S. Rep. No. 226, 105th Cong., 2d Sess. 5 (1998). The Senate Committee on Commerce, Science, and Transportation held a hearing to examine the problem. *The Children's Internet Protection Act: Hearing on S.97 Before the Senate Comm. on Commerce, Science and Transportation*, 106th Cong., 1st Sess. 1 (1999). During that hearing, the Committee heard testimony that adults "us[e] library computers to access pornography that are then exposed to staff, passersby and children," and that "minors also access[] child and adult pornography in libraries." *Id.* at 49 (prepared

statement of Bruce Taylor). The Committee also heard testimony that improved filtering products could provide a reasonably effective way to prevent access to illegal and harmful pornography. *Id.* at 20-26.

The House Subcommittee on Telecommunications, Trade, and Consumer Protection of the House Commerce Committee also held a hearing on the problems related to online obscenity. *Obscene Material Available Via The Internet: Hearing Before the Subcomm. on Telecommunications, Trade and Consumer Protection of the House Comm. on Commerce*, 106th Cong., 2d Sess. 1 (2000). At that hearing, the Committee received a report that documented more than 2000 incidents of patrons, including both adults and minors, using library computers to view online pornography, including obscenity and child pornography. *Id.* at 27. See J.A. 478-549 (David Burt, *Dangerous Access, 2000 Edition: Uncovering Internet Pornography in America's Libraries* (2000) (GX 8)).

d. To address the problems associated with the availability of online pornography at libraries, Congress enacted the Children's Internet Protection Act (CIPA), Pub. L. No. 106-554, Div. B, Tit. XVII, 114 Stat. 2763A-335. Sections 1712 and 1721(b) of CIPA provide that a library may not receive assistance for Internet access and related services under the E-rate or LSTA program, unless it has "a policy of Internet safety that includes the operation of a technology protection measure that protects against access" by all persons to "visual depictions" that are "obscene" or "child pornography," and that protects against access by minors to "visual depictions" that are "harmful to minors." 20 U.S.C. 9134(f)(1)(A)(i) and (B)(i); 47 U.S.C. 254(h)(6)(B)(i) and (C)(i).[1] A "technology protection measure" is defined as "a

[1] CIPA also applies to schools that receive grants under Title III of the Elementary and Secondary Education Act of 1965, and assistance

specific technology that blocks or filters Internet access to material covered by" CIPA. 47 U.S.C. 254(h)(7)(I).[2]

CIPA permits the library to "disable" the technology protection measure "to enable access for bona fide research or other lawful purposes." 20 U.S.C. 9134(f)(3); 47 U.S.C. 254(h)(6)(D). Under the E-Rate program, disabling is permitted "during use by an adult." 47 U.S.C. 254(h)(6)(D). Under the LSTA program, disabling is permitted during use by any person. 20 U.S.C. 9134(f)(3).

2. A group of libraries, library associations, library patrons, and web site publishers (appellees) filed suit in the United States District Court for the Eastern District of Pennsylvania against the United States and the government agencies and officials responsible for administering the E-rate and LSTA programs, challenging the constitutionality of CIPA's filtering provisions. J.S. App. 5a. Appellees alleged that the provisions of CIPA that apply to public libraries are facially unconstitutional because they induce

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under the E-rate program. 20 U.S.C. 6777; 47 U.S.C. 254(h)(5) (Sections 1711 and 1721(a) of CIPA). Those provisions are not at issue here. Pet. App. 16a.

[2] CIPA adopts the definitions of "obscene" and "child pornography" set forth in the federal criminal code. 20 U.S.C. 9134(f)(7)(D); 47 U.S.C. 254(h)(7)(E) (incorporating 18 U.S.C. 1460's definition of "obscene"); 20 U.S.C. 9134(f)(7)(A); 47 U.S.C. 254(h)(7)(F) (incorporating 18 U.S.C. 2256's definition of "child pornography"). CIPA defines "harmful to minors" as "any picture, image, graphic image file or other visual depiction that—(i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion; (ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and (iii) taken as a whole, lacks serious literary, artistic, political or scientific value as to minors." 20 U.S.C. 9134(f)(7)(B); 47 U.S.C. 254(h)(7)(G). CIPA defines a "minor" as an individual under the age of 17. 20 U.S.C. 9134(f)(7)(C); 47 U.S.C. 254(h)(7)(D).

public libraries to violate their patrons' First Amendment rights. *Ibid.* Appellees also alleged that CIPA imposes an unconstitutional condition on the receipt of federal assistance, imposes an impermissible prior restraint on speech, and is unconstitutionally vague. *Id.* at 5a & n.1. Pursuant to Section 1741(a) of CIPA, a three-judge district court was convened. J.S. App. 6a.

After a trial, the district court held that CIPA is facially unconstitutional because it induces public libraries to violate the First Amendment rights of their patrons. J.S. App. 13a. The court accordingly enjoined the government agencies and officials responsible for administering the E-Rate and LSTA programs from withholding federal assistance for Internet access or related services from any public library for failure to comply with CIPA. *Id.* at 191a.

The district court analyzed the constitutionality of CIPA under the framework for Spending Clause legislation set forth in *South Dakota* v. *Dole*, 483 U.S. 203, 207-210 (1987). J.S. App. 95a. Under that decision, Congress may not use its spending power "to induce the States to engage in activities that would themselves be unconstitutional." *Dole*, 483 U.S. at 210. The district court held that CIPA is facially unconstitutional under *Dole*, because, in the court's view, "any public library that complies with CIPA's conditions will necessarily violate the First Amendment." J.S. App. 102a.

The district court acknowledged that "generally the First Amendment subjects libraries' content-based decisions about which print materials to acquire for their collections to only rational [basis] review." J.S. App. 120a. But the court refused to apply that same constitutional analysis to libraries' content-based decisions regarding material they acquire from the Internet. *Id.* at 121a. "The central difference," the court stated, "is that by providing patrons with even filtered Internet access, the library permits patrons to receive speech on a virtually unlimited number of topics,

from a virtually unlimited number of speakers, without attempting to restrict patrons' access to speech that the library, in the exercise of its professional judgment, determines to be particularly valuable." *Ibid.* The court was therefore "satisfied that when the government provides Internet access in a public library," it has created a "designated public forum." *Id.* at 109a.

The district court next held that a public library's content-based restrictions on access to that "forum" trigger strict scrutiny. J.S. App. 128a. Based on its analysis of this Court's public forum and government subsidy decisions, *id.* at 127a-128a, the district court concluded that "where a public library opens a forum to an unlimited number of speakers around the world to speak on an unlimited number of topics, strict scrutiny applies to the library's selective exclusions of particular speech whose content the library disfavors." *Id.* at 128a. The court also concluded that strict scrutiny is applicable based on its understanding that a library's provision of Internet access "promotes First Amendment values in an analogous manner to traditional public fora, such as sidewalks and parks." *Ibid.*

Applying strict scrutiny, the district court held that the government has a compelling interest "in preventing the dissemination of obscenity, child pornography, or, in the case of minors, material that is harmful to minors." J.S. App. 139a. The court also concluded that, in certain circumstances, "a public library might have a compelling interest in protecting library patrons and staff from unwilling exposure to sexually explicit speech that, although not obscene, is patently offensive." *Id.* at 146a. Furthermore, the court found that "[t]he volume of pornography on the Internet is huge," that "library patrons of all ages, many from 11 to 15, have regularly sought to access it in public library settings," *id.* at 2a, and that "software filters provide a relatively cheap and effective, albeit imperfect, means for public libraries to

prevent patrons from accessing speech that falls within the filters' category definitions," *id.* at 90a-91a.

The district court nonetheless held that a public library's use of software filters to prevent access to illegal and harmful material is not narrowly tailored to further the government's interests. J.S. App. 149a. The court found that because of the limits of technology, filters set to prevent access to illegal and harmful pornography also restrict "many thousands of Web pages that are clearly not harmful to minors, and many thousands more pages that, while possibly harmful to minors, are neither obscene nor child pornography." *Id.* at 148a-149a.

The district court also concluded that there are less restrictive ways to prevent access to content covered by CIPA. J.S. App. 157a-167a. The court determined that libraries "can adopt Internet use policies that make clear to patrons that the library's Internet terminals may not be used to access illegal content," and they "can detect violations of their Internet use policies either through direct observation or through review of the library's Internet use logs." *Id.* at 158a-159a. The court concluded that a library could adopt similar policies to restrict minors from obtaining material that is harmful to minors. *Id.* at 162a. The court also determined that there are less intrusive methods to prevent patrons from "unwillingly being exposed to patently offensive, sexually explicit content," such as "plac[ing] unfiltered terminals outside of patrons' sight-lines and areas of heavy traffic," and "us[ing] privacy screens or recessed monitors." *Id.* at 164a-166a.

Finally, the district court held that CIPA's provisions permitting the library to disable the filtering software for any lawful purpose do not demonstrate that CIPA is narrowly tailored. J.S. App. 167a-177a. The court concluded that "the requirement that library patrons ask a state actor's permission to access disfavored content violates the First

Amendment." *Id.* at 170a. The court reasoned that patrons would be deterred from asking for permission to obtain access to speech "that is constitutionally protected, yet sensitive in nature." *Id.* at 171a-172a. While the court recognized that libraries may permit anonymous requests to disable the filtering software, it regarded that option as inadequate because such requests cannot be processed "immediately." *Id.* at 174a.[3]

SUMMARY OF ARGUMENT

I. The district court erred in holding that CIPA induces public libraries to violate the First Amendment rights of their patrons. Public libraries have broad discretion to decide what material to add to their collections, and the use of filtering software to block access to online pornography falls well within the permissible limits of that discretion.

A. The traditional mission of public libraries is to facilitate worthwhile and appropriate research, learning, and recreational reading and pursuits. To fulfill that mission, public libraries must have broad discretion to make content-based

[3] In a lengthy footnote (J.S. App. 180a-188a n.36), the district court discussed appellees' alternative contention that CIPA imposes an unconstitutional condition on the receipt of federal assistance. In the course of that discussion, the court expressed the view that appellees' position that public libraries may assert First Amendment rights "may well be correct." *Id.* at 184a n.36. The court also stated that public libraries might also be able to "rely on their patrons' rights, even though their patrons are not the ones who are directly receiving the federal funding." *Ibid.* The court further stated "that [appellees] have a good argument that CIPA's requirement that public libraries' use of filtering software distorts the usual functioning of public libraries in such a way that it constitutes an unconstitutional condition on the receipt of funds." *Id.* at 188a n.36. But the court ultimately did not resolve any of those issues. *Id.* at 179a-180a & 188a n.36. The court also did not address appellees' contentions that CIPA imposes a prior restraint on speech and is unconstitutionally vague. *Id.* at 179a.

judgments in selecting material for their collections. For that reason, neither forum analysis nor strict scrutiny applies to a public library's collection decisions. Those doctrines would threaten to allocate to courts, rather than public libraries, the role of selecting what material should be included in the collections that public libraries make available in their local communities.

This Court has held that forum analysis and strict scrutiny are incompatible with the discretion that public television stations must have to fulfill their journalism missions, *Arkansas Educational Television Commission* v. *Forbes*, 523 U.S. 666, 672-673 (1998), and the discretion that the National Endowment for the Arts must have to fulfill its mission to select worthwhile art, *National Endowment for the Arts* v. *Finley*, 524 U.S. 569. 585-586 (1998). Similarly, those doctrines are incompatible with the discretion that public libraries must have to fulfill their traditional missions. Rather than applying strict scrutiny to a public library's collection decisions, a court should instead apply rational basis review.

B. The deference owed to public library's collection decisions extends to its judgments about what material to collect from the Internet. Libraries collect material from the Internet for the same reasons that they collect books and other resources, and they therefore need the same degree of discretion to make judgments regarding what material to collect. Thus, just as public libraries have broad discretion to exclude pornography from their print collections, they have broad discretion to exclude pornography from their Internet collections.

C. Even if forum analysis were applicable to a public library's Internet collection decisions, strict scrutiny would not apply. If subjected to forum analysis, a public library's Internet-connected computers would most appropriately be viewed as a nonpublic forum. The entity responsible for a

nonpublic forum may make content-based exclusions that are reasonable in light of the purposes of the forum, provided they are viewpoint neutral. Since there is no allegation of viewpoint discrimination here, the question presented by forum analysis would be whether the use of filtering is reasonable in light of the traditional purposes of a public library.

Strict scrutiny also would not apply if a public library's Internet-connected computers were viewed as a designated public forum. The standard for reviewing exclusions from a limited public forum is essentially the same reasonableness standard as the one that applies to exclusions from a nonpublic forum.

D. Regardless of whether the standard for reviewing a public library's collection practices is rationality or reasonableness, a library's use of filtering software to block material covered by CIPA is constitutional. The district court itself found that filtering software is a reasonably effective way to block pornographic material, and that such material falls outside of a public library's traditional collection boundaries.

The district court's finding that filtering software erroneously blocks some constitutionally protected speech does not undermine the reasonableness of their use. Libraries decline to collect many books that are constitutionally protected, and declining to collect constitutionally protected materials from the Internet is equally unproblematic. Public libraries may reasonably conclude that it best furthers their missions to use a resource that is effective in keeping out pornography, even if that resource keeps out some material that is not pornographic.

Moreover, patrons will only infrequently be unable to find the information they need because a particular Web site has been blocked. Only a very small percentage of all sites on the Web are erroneously blocked; information that is erroneously blocked can often be found on other sites or in the

library's print collection; patrons may always ask the library to unblock the site or (at least in the case of adults) disable the filter; and the library's policies concerning the use of its own computers do not prevent patrons from obtaining access to the Internet through computers located elsewhere.

The district court believed that closely monitoring patrons who use the Internet would be a less restrictive alternative than using filtering software. A public library, however, is not required to satisfy a court that it has used the least restrictive alternative. In any event, closely monitoring patrons who use the Internet would be *more* restrictive than using filtering software. It would deeply intrude on patron privacy, significantly change the experience for everyone who visits a public library, alter the relationship between librarians and patrons, and needlessly expose librarians to pornography many would prefer not to see.

E. The use of filtering software also satisfies strict scrutiny. Public libraries have a compelling interest in restricting access through their own computers to online obscenity, child pornography, and (in the case of minors) material that is harmful to minors. The use of filtering software is the least restrictive method to further that compelling interest.

II. There are no alternative grounds for affirming the district court's judgment. Appellees face a serious threshold barrier in making their claim that CIPA imposes an unconstitutional condition on their receipt of federal assistance. The courts of appeals that have addressed the issue have all concluded that governmental entities do not have First Amendment rights. Appellees seek to rely on the First Amendment rights of their patrons. But the unconstitutional conditions doctrine applies only to those upon whom purportedly unconstitutional conditions are actually imposed. CIPA does not impose any conditions on library patrons. Moreover, as explained in Point I, the use of

filtering software does not violate the First Amendment rights of patrons.

Assuming *arguendo* that public libraries may assert a First Amendment unconstitutional condition claim, there no merit to such a claim here. Congress may reasonably insist that those who receive federal assistance for Internet access and related services take the modest step of using filtering software to ensure that the assistance Congress has provided for educational and informational purposes does not facilitate access to illegal and harmful pornography. That condition does not distort the usual functioning of a public library. The material to which CIPA seeks to prevent access falls outside the collection boundaries of most public libraries, and many public libraries have determined that filtering software is the best way to prevent access to such material in a manner that is consistent with their missions. If a public library wishes to provide unfiltered access, it is free to decline federal assistance for Internet access and related services.

Nor is the use of filtering software a prior restraint on speech. Libraries that use filtering software do not regulate what speech may be placed on the Internet or prevent its dissemination throughout the world. They simply decline to obtain pornography from the Internet through their own computers and make it available to their patrons. That decision is no more a prior restraint on speech than a public library's decision to decline to subscribe to pornographic magazines. The judgment of the district court should therefore be reversed.

ARGUMENT

CIPA'S FILTERING PROVISIONS ARE FACIALLY CONSTITUTIONAL

I. CIPA DOES NOT INDUCE PUBLIC LIBRARIES TO VIOLATE ANY FIRST AMENDMENT RIGHTS OF THEIR PATRONS

This case involves the facial validity of an Act of Congress designed to ensure that federal assistance to libraries for Internet access and related services does not facilitate access to visual depictions that are obscene, child pornography, or harmful to minors. Under CIPA, a library may not receive federal assistance for Internet access and related services unless the library has a policy that includes the use of filtering software on Internet-connected computers that protects against access by all persons to visual depictions that are "obscene" or "child pornography," and that protects against access by minors to visual depictions that are "harmful to minors." 47 U.S.C. 254(h)(6)(B) and (C); 20 U.S.C. 9134(f)(1).

CIPA is not an exercise of Congress's regulatory authority over purely private conduct. Instead, it is an exercise of Congress's authority under the Spending Clause "to provide for the * * * the General Welfare of the United States," Article I, Section 8, Clause 1, by specifying the purposes for which federal assistance to libraries may be used. As such, CIPA's filtering conditions attach only when a library voluntarily chooses to accept federal assistance for Internet access and related services.

Because CIPA's filtering provisions are conditions on the receipt of federal assistance, and not regulatory restrictions, this Court's Spending Clause cases provide the appropriate framework for assessing CIPA's constitutionality. Under those cases, Congress has wide latitude to attach conditions

to the receipt of federal assistance in order to further broad policy objectives. *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987). Congress's discretion to impose such conditions on state and local government entities, however, is subject to four limitations. First, the exercise of the spending power must be in pursuit of "the general welfare." *Id.* at 207. Second, Congress must condition the receipt of assistance "unambiguously." *Ibid.* Third, the condition must be related "to the federal interest in particular national projects or programs." *Ibid.* Fourth, Congress may not "induce" the recipient "to engage in activities that would themselves be unconstitutional." *Id.* at 210.

CIPA easily satisfies each of the first three limitations, and neither the district court nor appellees have suggested otherwise. J.S. App. 96a. Patrons seeking access to illegal and harmful online pornography in public libraries is a serious problem, and Congress's goal of ensuring that federal assistance to libraries does not facilitate such access is in "pursuit of the public welfare." The requirement that libraries receiving federal assistance use filtering technology that protects against access to such material is stated "unambiguously." 47 U.S.C. 254(h)(6)(B) and (C); 20 U.S.C. 9134(f)(1). And that requirement is also directly related to Congress's purpose in providing assistance to libraries for Internet access—to further the libraries' educational and informational missions. See 47 U.S.C. 254(h); 20 U.S.C. 9121, 9141(a)(1)(B); S. Rep. No. 226, *supra*, at 4.

Invoking *South Dakota* v. *Dole*'s fourth limitation, the district court held that the provisions of CIPA that apply to public libraries are facially unconstitutional because, in the court's view, a public library that uses filtering software in compliance with CIPA will necessarily violate the First Amendment rights of its patrons. The court reasoned that (1) a public library that connects its computers to the Internet creates a "designated public forum," (2) strict scrutiny

applies to content-based limitations on access to that "forum," and (3) the use of filtering software is not narrowly tailored to serve any compelling government interest.

That analysis is incorrect. A public library, like any library, has broad discretion to decide what information to make available to its patrons through its own computers, and the use of filtering software to protect against access to obscenity, child pornography, and material that is harmful to minors falls well within the permissible limits of that discretion.

A. Public Libraries Have Broad Discretion To Select The Material They Make Available To Their Patrons

1. To fulfill their traditional missions, public libraries must have broad discretion to decide what material to provide to their patrons. For that reason, neither forum analysis nor strict scrutiny applies to a public library's collection decisions.

The first municipally-supported public library, the Boston Public Library, opened in 1854, and had as its mission "to promote equality of education opportunity, to advance scientific investigation, to save youth from the evils of an ill-spent leisure, and to promote the vocational advancement of the workers." J.A. 612 (GX 186 (Expert Report of Donald G. Davis, Jr. at 2)) (citation omitted). Over time, public libraries began to collect materials for recreational reading and other purposes as well. J.S. App. 33a. But facilitating learning and cultural enrichment have remained a focal point for most public libraries. Indeed, the American Library Association's current Bill of Rights provides that "[b]ooks and other library resources should be provided for the interest, information, and enlightenment of all people of the community the library serves." *Id.* at 32a.

Consistent with their missions, public libraries seek to provide a wide array of information to the public. J.S. App.

33a. As the district court found, however, the goal of public libraries has never been to provide "universal coverage." *Id.* at 34a. Instead, public libraries seek to provide materials "that would be of the greatest direct benefit or interest to the community." *Id.* at 34a-35a. As the district court found, in doing so, public libraries seek to develop collections that have "*requisite and appropriate quality.*" *Id.* at 34a (emphasis added). Of necessity, public libraries therefore take into account the "*content of the material*" in making collection decisions. *Id.* at 35a (emphasis added). Some material may be selected for "artistic merit, scholarship, or value to humanity," while other material may be selected "to satisfy the informational, recreational and educational needs of the community." J.A. 586 (GX 114, at 3). In all cases, however, the content of the work is necessarily a factor in making a collection decision.

The need to make selective judgments stems in part from the economic reality that public libraries have finite budgets. J.S. App. 8a. But since the fundamental role of public libraries is to identify for their patrons material that has "requisite and appropriate quality," *id.* at 34a, public libraries would make selective judgments even if they had access to unlimited funds. See William A. Katz, *Collection Development: The Selection of Materials for Libraries* 6 (1980) ("[t]he librarian's responsibility * * * is to separate out the gold from the garbage, not to preserve everything"); Francis K.W. Drury, *Book Selection* xi (1930) ("It is the aim of the selector to give the public, not everything it wants, but the best of what it will read or use to advantage."); J.A. 636 (GX 187 (Rebuttal Expert Report of Donald G. Davis, Jr., at 3)) ("A hypothetical collection of everything that has been produced is not only of dubious value, but actually detrimental to users trying to find what they want to find and really need.").

That is certainly true with respect to pornographic material. Many public libraries include in their print collections sexually explicit materials that have significant value, such as "*The Joy of Sex*" and "*The Joy of Gay Sex.*" J.S. App. 33a. But very few public libraries collect graphic pornography, such as XXX-rated videos, or *Hustler* magazine. *Ibid.* The absence of pornographic books and videos from public libraries is not simply a function of finite budgets. Instead, it reflects a near universal consensus among public libraries that such materials are not appropriate for inclusion in their collections. J.A. 663-664 (GX 189 (Cronin Expert Report), at 6).

Thus, in fulfilling their traditional missions, public libraries necessarily make content-based collection decisions, including judgments concerning whether to collect pornographic material. Application of forum analysis and strict scrutiny would be incompatible with that tradition.

Indeed, subjecting collection decisions to forum analysis and strict scrutiny would risk transforming the role of public libraries in our society. Instead of vesting in public libraries responsibility for the resources that they collect and make available to their local communities, forum analysis would threaten to substitute judicial judgments regarding what is appropriate. A public library's traditional exercise of discretion to determine what materials to collect would be particularly threatened by application of strict scrutiny to collection decisions, which would require a library to establish that a challenged decision furthers a "compelling" interest, and that less restrictive alternatives would not be effective. *United States* v. *Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813, 816 (2000). Libraries would often be hard-pressed to show that the selection of one resource rather than another always furthers a "compelling" government interest. Nor are libraries always likely to be in a position to demonstrate that there are no alternatives that

would be less restrictive, while still serving the library's overall collection goals. Libraries would also be vulnerable to charges that they have collected too many or too few works containing particular viewpoints. The very prospect of strict judicial review of collection decisions could chill libraries from exercising traditional editorial judgments.

2. This Court has not decided what level of scrutiny applies to a public library's content-based judgments regarding the material it makes available to its patrons. In two analogous contexts, however, the Court has made clear that the government has broad discretion to make content-based judgments in deciding what private speech to make available to the public. In those contexts, neither forum analysis nor strict scrutiny applies.

In *Arkansas Educational Television Commission* v. *Forbes*, 523 U.S. 666, 672-673 (1998), the Court held that public forum principles do not generally apply to a public television station's editorial judgments regarding the private speech or other programming it presents to its viewers. The Court explained that "[b]road rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations." *Id.* at 673. Recognizing a broad right of public access, the Court added, "would risk implicating the courts in judgments that should be left to the exercise of journalistic discretion." *Id.* at 674.[4]

[4] *Forbes* held that "[a]lthough public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine, candidate debates present the narrow exception to that rule." 523 U.S. at 675. In that limited context, a public broadcasting station is treated as a nonpublic forum and therefore may not engage in viewpoint discrimination. *Id.* at 681-682. There is nothing comparable to candidate debates in the materials subject to CIPA, and there is no claim of viewpoint discrimination here.

Similarly, in *National Endowment for the Arts* v. *Finley*, 524 U.S. 569 (1998), the Court upheld an art funding program that required the National Endowment for the Arts (NEA) to use content-based criteria in the process of making funding decisions. The Court explained that "any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of art funding." *Id.* at 585. In particular, "[t]he very assumption of the NEA is that grants will be awarded according to the 'artistic worth of competing applicants,' and absolute neutrality is simply inconceivable." *Ibid.* (internal quotation marks omitted). The Court expressly rejected the application of forum analysis to art funding decisions, reasoning that such an analysis would conflict with "NEA's mandate * * * to make esthetic judgments, and the inherently content-based 'excellence' threshold for NEA support." *Id.* at 586. See *Widmar* v. *Vincent*, 454 U.S. 263, 278 (1981) (Stevens, J., concurring in the judgment) (in order to safeguard the academic freedom of public universities, a public university's content-based decisions in allocating space for student programs should not routinely be subjected to forum analysis or strict scrutiny); *Board of Education* v. *Pico*, 457 U.S. 853, 871 (1982) (plurality opinion) (public school has authority to remove books from a school library based on a determination that they are educationally unsuitable or pervasively vulgar); *id.* at 890-891 (Burger, C.J., dissenting) (public school's discretion to remove books from a school library is not constrained by the First Amendment).

The principles underlying *Forbes* and *Finley* also apply to a public library's exercise of judgment in selecting the material it makes available to its patrons. Just as forum analysis and heightened judicial scrutiny are incompatible with the discretion that public television stations must have to fulfill their journalistic responsibilities, and the discretion that the NEA must have to fulfill its responsibility to select worth-

while art, they are also incompatible with the discretion that public libraries must have to fulfill their traditional missions.

B. A Library's Broad Discretion To Make Collection Decisions Applies To Its Selection Of Material From The Internet

The district court acknowledged that libraries may select books for their collections on the basis of content without triggering forum analysis or strict scrutiny. Such collection decisions, the court concluded, are subject only to rational basis review. J.S. App. 120a. But the court refused to apply that same analysis to a public library's judgments regarding the material it makes available to its patrons through its Internet-connected computers. In the court's view, a public library that collects material from the Internet creates a "designated public forum," and strict scrutiny applies to content-based limitations on access to that "forum." For constitutional purposes, however, there is no relevant distinction between a library's collection of material from the Internet and its collection of books and other resources.

1. A public library does not make computers available to obtain material from the Internet in order to create a public forum for Web publishers to speak, any more than it collects books in order to provide a public forum for the authors of the books to speak. It provides Internet access for the very same reasons that it offers other library resources—to facilitate research, learning, and recreational pursuits through the furnishing of materials having requisite and appropriate quality. As Congress recognized, "[t]he Internet is simply another method for making information available in a school or library." S. Rep. No. 141, 106th Cong., 1st Sess. 7 (1999). In a very real sense, it is "no more than a technological extension of the book stack." *Ibid.*

Consistent with that understanding, public libraries exercise the same kind of judgments concerning the Internet that

they routinely apply to other media. For example, some libraries prohibit the use of their computers for the viewing of materials that are "offensive to the public," "objectionable," or "inappropriate." J.S. App. 37a. Other libraries prevent access to Web sites that contain graphic violence or tasteless material. GXs 71, 83, 99, 247. Other libraries do not allow patrons to use the libraries' computers to send and receive e-mail or to participate in chat rooms. J.S. App. 38a. Still other libraries forbid access to Web sites that include games or dating services. *Id.* at 37a-38a. And consistent with their practice with respect to books, magazines, and movies, many libraries prohibit their patrons from viewing online pornography. *Id.* at 37a. Those judgments are no less entitled to deference than the similar judgments that libraries make in deciding what books to collect.

As the district court itself recognized, a library's authority to collect material from the Internet cannot be distinguished from its authority to collect books on the ground that, once a library connects to the Internet, a library does not incur additional cost by offering additional material. J.S. App. 126a n.25. Many libraries do not have enough Internet-connected computers to meet patron demand. *Ibid.* In those circumstances, a library that allows its patrons to use its computers to send e-mail, play games, or view pornography necessarily denies other patrons the opportunity to use the computer for other purposes, such as research. See J.A. 663 (GX 189) (Cronin Expert Report), at 6) ("By permitting pornography to be viewed on their premises, public librarians are constraining those patrons interested in accessing educational and information resources."); see also J.S. App. 126a n.25 ("every time library patrons visit a Web site, they deny other patrons waiting to use the terminal access to other Web sites"). That circumstance requires public libraries to make judgments about what material they will make available through their Internet-connected computers.

Even if a library could always provide enough computers to meet patron demand, however, that would not change the analysis. Ultimately, a public library's need to exercise judgment in making collection decisions depends not on resource limitations, but on the traditional role that public libraries play in our society in identifying material that is suitable and worthwhile for their patrons. A library is no less entitled to play that role when it collects material from the Internet than when it collects material from any other source. Thus, if libraries have broad discretion to refrain from including pornographic magazines and XXX-rated movies in their collections, as they unquestionably do, they should also have broad discretion not to collect comparable material from the Internet.

2. The district court distinguished a library's collection of material from the Internet from its collection of books on a single ground. "The central difference," the court stated, "is that by providing patrons with even filtered Internet access, the library permits patrons to receive speech on a virtually unlimited number of topics, from a virtually unlimited number of speakers, without attempting to restrict patrons' access to speech that the library, in the exercise of its professional judgment, determines to be particularly valuable." J.S. App. 121a. In contrast, the court continued, "the content of every book that a library acquires has been reviewed by the library's collection development staff or someone to whom they have delegated the task, and has been judged to meet the criteria that form the basis for the library's collection development policy." *Id.* at 122a-123a.

That is not a tenable ground for subjecting a public library's book-collection decisions to rational basis review, while subjecting a public library's Internet collection decisions to strict scrutiny. A public library's decision to exclude dating services, games, e-mail, chatrooms, graphic violence, tasteless jokes, or pornography from its Internet

collection is clearly an exercise of a library's traditional discretion to exclude material that lacks the requisite and appropriate quality or that otherwise falls outside the library's mission. A public library's failure to make quality-based judgments about all the material it collects from the Web does not somehow taint the judgments it does make.

Moreover, because of the vast quantity of material on the Internet and its rapidly changing nature, libraries cannot possibly segregate, on an item-by-item basis, all the Internet material that is appropriate for inclusion in the library's collection from all the material that is not. While a public library could limit its Internet collection to just those sites it found worthwhile, it could do so only at the cost of excluding an enormous amount of valuable information that it lacks the capacity to review. Given that tradeoff, it is entirely reasonable for public libraries to reject that approach and instead exclude categories of content they regard as inappropriate for inclusion in a public library, without making individualized judgments that everything they do make available has requisite and appropriate quality. A public library's judgment that such an approach best serves its historic mission is entitled to substantial deference, not judicial suspicion.

Indeed, rather than promoting First Amendment values, the district court's analysis has the opposite effect. Under the district court's analysis, a public library that provides Internet access only to the limited number of sites its staff has had the time to review in advance would have broad discretion to make its selections. In contrast, a public library that provides access to a much wider range of material, but prevents access to certain material its staff has determined to be of low value or otherwise outside its mission, would have to justify its judgments under strict scrutiny. The district court's approach therefore creates a perverse incentive

for public libraries to make available *less* information in order to preserve their traditional discretion.

The district court's approach is particularly unpersuasive as applied to a public library's decision to exclude pornographic content. Most libraries already exclude pornography from their print collections because they regard it as inappropriate for inclusion in a public library. Under the district court's analysis, that judgment would be subjected to rational basis review, while a judgment to exclude online pornography from the library's Internet collection for precisely the same reason would be presumptively unconstitutional.

To the extent that the district court's analysis suggests a distinction between judgments of exclusion and judgments of inclusion, such a distinction is also untenable in this setting. "The job of the librarian is to know what to exclude as well as what to include." Will Manley, *The Manley Arts: Good Fences Make Good Libraries*, *Booklist* 446 (Nov. 1, 2001). For example, "[m]edical libraries don't need the definitive works of James Joyce. A corporate library does not need a complete section of animal-husbandry materials." *Ibid.* "Systematic weeding is an integral part of the selection process which helps maintain the quality of the Library's collection." J.A. 590 (GX 114, at 7). And, as noted above, most public libraries exclude pornography based on their judgment that it does not further their mission. As those examples illustrate, judgments of exclusion, like judgments of inclusion, play an important role in the development of a library's collection.

A public library's book collection authority also cannot be distinguished from its Internet collection authority on the ground that libraries rely on software companies to develop appropriate filtering programs. Libraries often rely on journal reviews and bibliographies to select their books, and they sometimes delegate to third party vendors the task of

supplying books that satisfy the libraries' collection standards. J.S. App. 35a. While libraries retain ultimate control over their book collections, they also retain ultimate control over their Internet collections. Public libraries select the software and blocking categories that best meet their needs, and can fine tune the software to add or delete specific sites from a blocking category. *Id.* at 52a.

C. The District Court's Application Of Strict Scrutiny Is Not Supported By Precedent

1. In applying strict scrutiny to a public library's Internet collection decisions, the district court relied on several of this Court's public forum and government subsidy cases. J.S. App. 127a-128a. But those cases resolved First Amendment issues far removed from the question presented here.[5]

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[5] See *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829-831 (1995) (university that furnishes funds to groups to encourage a diversity of views from students may not refuse to fund speech that is otherwise within the parameters of the funding program solely on the basis of the viewpoint of the speaker); *City of Madison* v. *Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175-176 (1976) (school board required by law to hold public meetings where citizens participate may not "permit one side of a debatable public question to have a monopoly in expressing its views to the government"); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 552-555, 559-560 (1975) (municipal auditorium that is dedicated to discussion of public affairs by civic and other organizations may not deny a permit without following the established procedural safeguards that must accompany prior restraints on speech); *FCC* v. *League of Women Voters*, 468 U.S. 364, 381-382, 399-400 (1984) (prohibition against editorializing by broadcast stations that receive federal funds violates First Amendment because "the expression of editorial opinion lies at the heart of First Amendment protection," and because stations receiving federal assistance were not permitted to establish an "affiliate organization" that could then "editorialize with non-federal funds"); *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 546 (2001) (funding restriction that prohibits attorneys from challenging welfare laws violates the First Amendment because it restricts speech based on the

None of those cases involved a public library. None of those cases involved a government institution or program designed to make available private works having requisite and appropriate quality. And none of those cases suggested that a public library's collection decisions should be subjected to strict scrutiny.

2. The district court also justified its application of strict scrutiny based on a separate line of authority holding that content-based limitations on access to a traditional public forum, such as a public sidewalk or park, are subject to strict scrutiny. J.S. App. 128a. See *Police Dep't of the City of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972). Internet access at public libraries, however, does not satisfy this Court's definition of a traditional public forum. A public library's Internet-connected computers—a resource that did not exist until the past decade or so—have not "immemorially been held in trust for the use of the public and, time out of mind, * * * been used for purposes of assembly, communication of thoughts between citizens, and discussing public questions." *International Society for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 679 (1992).

Indeed, the district court acknowledged that the use of a public library's computers for Internet access does not satisfy the Court's test for a traditional public forum. J.S. App. 129a. The district court nonetheless viewed a public library's furnishing of material from the Internet as analogous to a traditional public forum, *id.* at 128a, because a public library itself is generally open to the public at no cost, *id.* at 129a-130a, and because the Internet permits speakers to reach a wide audience at a low cost, *id.* at 131a. That analysis is seriously flawed. This Court "has rejected the view that traditional public forum status extends beyond its

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anti-government viewpoint of the speaker and interferes with the proper functioning of the legal profession and the judiciary).

historic confines." *Forbes*, 523 U.S. at 678. The doctrines applicable to traditional public fora therefore may not be extended by analogy.

Even if they could, the district court's analogy is misconceived. Public sidewalks and parks are not public fora simply because the public may use them for free. Rather, they are public fora because private speakers, and not the government, have always determined the content of the speech that occurs there. In contrast, while public libraries have always been open to the public, they are open for particular purposes. They are not dedicated to the full range of uses available in a public park or on a public sidewalk, and they are not dedicated to general public discussion and debate, as any patron who has been told to stop talking by a librarian can attest. And, most significantly, public libraries have always determined the content of the works they collect and make available to their patrons. For similar reasons, the district court's analogy is not aided by the observation that speakers can reach a wide audience through the Internet. It is not the speakers' ability to reach a wide audience that makes a public sidewalk or park a traditional public forum, but the tradition of private speakers determining the content of the speech in such a forum.

Moreover, the district court's reliance on the nature of the Internet ignores the fundamental difference between the Internet itself and a public library's decision whether to allow the use of its own computers to retrieve various types of material from the Internet. The Internet itself is a forum for First Amendment activity, but it is not one that is government-owned. When a government places restrictions on the content that may be placed on the Internet, it acts as a regulator of private activity, and its restrictions are subject to strict scrutiny. *Reno* v. *ACLU*, 521 U.S. 844 (1997). In contrast, when a public library brings material from the Internet into the library through its own computers, it acts

as a collector of material for its patrons. It does not regulate the content of communication on the Internet, control its dissemination throughout the world, or affect access to that information through *other* computer terminals. In essence, a public library acts as a market participant, not as a market regulator, when it determines the extent to which it will obtain material from the Internet through its own computers in its own premises. Cf. *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976). In that capacity, a public library necessarily has both the responsibility and discretion to decide, within the broad limits traditionally accorded such institutions, how little or how much material to provide from the Internet.

D. Even If A Library's Connection Of Its Computers To The Internet Created A Forum, Strict Scrutiny Would Not Apply

1. Even if forum analysis applied to a public library's selection of material from the Internet, strict scrutiny would not apply to a library's use of filtering software to block material covered by CIPA. "The Court [has] identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). As discussed above, a public library's Internet-connected computers are not traditional public fora. Accordingly, if forum analysis were applicable to a library's Internet-connected computers, they could only be either nonpublic fora or designated public fora. Of the two, they would more appropriately be viewed as nonpublic fora.

A designated public forum is created only when the government by "fiat" makes an affirmative choice to open up its property for use as a public forum. *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). "The government does not create a public forum by inaction or by

permitting limited discourse, but only by opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 788.

For the same reasons that a library's Internet collection is not subject to forum analysis at all, it also does not satisfy the definition of a designated public forum. As already discussed, public libraries do not connect to the Internet in order to open up a forum for web publishers to speak; instead, they do so to further the library's traditional mission of facilitating research, learning, and recreational reading or pursuits. Moreover, public libraries have always reserved the right to determine the content of their collections, including their Internet collections, and to exclude from their collections materials that do not have requisite and appropriate quality. That practice is inconsistent with an intent to create a designated public forum. *Cornelius*, 473 U.S. at 804 (limiting participation in Combined Federal Campaign to "appropriate" voluntary agencies is inconsistent with an intent to create a designated public forum).

Thus, if forum analysis were applicable, a public library's Internet collection should be treated as a nonpublic forum. Under this Court's decisions, the government may limit access to a nonpublic forum based on content "so long as the distinctions drawn are reasonable in light of the purposes served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806. The distinctions at issue are viewpoint neutral. CIPA provides for libraries to draw distinctions based on whether the material is "obscene," "child pornography," or "harmful to minors," not on the basis of any particular viewpoint on sexuality. Similarly, the commercial filtering products used by public libraries draw distinctions based on whether the material falls into a category such as "Pornography," J.S. App. 49a, not on the basis of any viewpoint about sexuality. The principle that the entity in charge of a nonpublic forum may not discriminate on the

basis of viewpoint is therefore not implicated here. See *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 384-385 (1992) (prohibitions against obscenity and child pornography are based on content not viewpoint); *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 684-685 (1986) (prohibition against lewd and indecent speech is based on content, not viewpoint); *FCC* v. *Pacifica Found.*, 438 U.S. 726, 745-746 (1978) (plurality opinion) (restriction on patently offensive words dealing with sex is based on content, not viewpoint).

Because the use of filtering software involves distinctions based on content, rather than viewpoint, if a public library's Internet-connected computers were viewed as non-public fora, strict scrutiny would not apply. Instead, the relevant inquiry would be whether the use of the software is "reasonable in light of the purposes served by the forum." *Cornelius*, 473 U.S. at 806. Because a library's purpose in connecting to the Internet is to facilitate research, learning, and recreation of requisite and appropriate quality, the question would be whether the use of filtering software is reasonable in light of that purpose.

2. That same analysis would apply even if a public library's Internet-connected computers were treated as a designated public forum. In establishing a designated forum, the government is not required to create the equivalent of a traditional public forum that is presumptively available for expressive activities of all kinds, on all subjects, by all speakers. The government may instead create a "limited" public forum, and "confine" the forum "to the limited and legitimate purposes for which it was created." *Rosenberger*, 515 U.S. at 829. The constitutional standard applicable to a "limited" public forum is essentially the same as the constitutional standard applicable to a nonpublic forum. The government "may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum,'

* * * nor may it discriminate against speech on the basis of its viewpoint." *Ibid.*

If a library's Internet-connected computers were treated as a designated public forum, the designation would be for the limited purpose of facilitating appropriate research, learning, and recreational reading and other pursuits. As such, the relevant constitutional inquiry would not be whether the use of filtering software is narrowly tailored to further a compelling interest, but whether it is "reasonable" in light of those limited purposes. *Rosenberger*, 515 U.S. at 829-830.

E. The Use of Filtering Software Is A Reasonable Method To Exclude Pornography From A Public Library's Internet Collection

Regardless of whether a public library's collection of material from the Internet is subject to review for rationality or reasonableness, a library's use of filtering software to prevent access to material covered by CIPA is facially constitutional. The character of (and the reasonableness of any limitation on) any "forum" that results from installing computers and connecting them to the Internet must take account of the fact that the computers and the access to the Internet they afford thereby become part of the resources of a library. Because public libraries have traditionally not included pornographic materials in their collections, a public library's decision not to include pornography in the material it collects from the Internet constitutes a "reasonable" limitation on any nonpublic or limited public "forum" the library may be deemed to have created. And the use of filtering software is, in turn, a reasonable method to block access to pornographic material.

1. The district court recognized that pornographic material falls outside a public library's traditional collection boundaries. J.S. App. 33a. It also found that filtering soft-

ware is a reasonably effective way to screen out access to such material. *Id.* at 90a-91a. The district court nonetheless held that the use of filtering software is constitutionally deficient because all leading commercial filters block some constitutionally protected speech that does not fit into the categories identified by CIPA or the software categories that best capture CIPA material. *Id.* at 149a. For several reasons, the imperfection of filtering software does not affect the reasonableness of a library's judgment to use it.

First, a public library does not have an obligation to add material to its collection simply because the material is constitutionally protected. Public libraries do not include hundreds of thousands of constitutionally protected books, magazines, and videos in their collections. A library's decision not to provide certain constitutionally protected material through its Internet-connected computers raises no greater constitutional concern.

Second, a public library may reasonably decide that, in order to avoid making certain inappropriate material available to its patrons, it will also decline to make available certain material that may be worthwhile. For example, a public library may decide not to collect a particular magazine because of its pornographic pictures, even though that same magazine might contain worthwhile interviews with public figures. Relying on a similar judgment, a public library may decide to use filtering software that blocks material that is pornographic, even though it may also block some material that is non-pornographic.

Third, a library patron would only infrequently need to have access to a Web site that has been blocked in order to obtain the information he or she seeks. Based on the evidence submitted by appellees' own expert, filtering software erroneously blocks less than 1% of all Web sites. J.S. App. 79a, 85a (in sample of 500,000 sites, filtering software may have erroneously blocked "somewhere between 4,403 and

4,783 Web sites"). A recently released study confirms that blocking software has only a negligible impact on access to valuable information. Carolyn R. Richardson et al., *Does Pornography-Blocking Software Block Access to Health Information on the Internet*, 288 JAMA 2887 (2002). The study found that when a filter is set to the least restrictive setting, such as the "pornography" setting on one of the most widely used filters in public libraries (N2H2), it blocks 1.4% of all health sites. *Id.* at 2891-2892, 2899.[6] Any information that may be erroneously blocked can often be found on another Web site or on the library's bookshelves. For example, a witness who performed a search of the term "breast cancer" found that the first 50 sites were not blocked. 3/28/02 Tr. 97-98 (testimony of Tacoma librarian Biek). Similarly, as the district court found, many libraries carry books on human sexuality, such as *The Joy of Sex* and *The Joy of Gay Sex*. J.S. App. 33a.

Fourth, when patrons are unable to view a site because it has been blocked, the patron need only ask a librarian to unblock the site or (at least in the case of adults) disable the filter. As the district court found, libraries have the capacity to permanently unblock any erroneously blocked site. J.S. App. 52a. At least with respect to adults, CIPA also ex-

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[6] The above estimates are not inconsistent with the estimates cited by the district court that between 6% and 15% of the material blocked by filtering software is erroneously blocked. J.S. App. 149a. Those who made the 6%-15% estimates examined a sample of sites that were blocked, and determined the percentage of those sites that were erroneously blocked. Those who made the estimates in the text examined a sample of sites, without regard to whether they were blocked or unblocked, and determined the percentage of those sites that were erroneously blocked. The estimates in the text are more relevant in determining the effect of erroneous blocking on patrons, because patrons search for material throughout the entire universe of the web; they do not limit their searches to blocked sites.

pressly authorizes library officials to "disable" a filter altogether "to enable access for bona fide research or other lawful purposes." 20 U.S.C. 9134(f)(3) (disabling permitted for both adults and minors); 47 U.S.C. 254(h)(6)(D) (disabling permitted for adults).

The district court viewed unblocking and disabling as inadequate because some patrons may be too embarrassed to ask for assistance from a librarian. J.S. App. 172a. But library patrons are accustomed to asking for assistance from librarians—to locate material in the collection, to retrieve books in closed book stacks or on reserve, or to borrow materials from another library. Indeed, librarians answer more than seven million questions weekly. *Id.* at 33a-34a. There is no reason to anticipate that patrons will be any less willing to ask for assistance in obtaining information from the Internet. Moreover, the Constitution does not guarantee a patron the right to acquire information at a public library without any risk of embarrassment. Library patrons can be observed by librarians and other members of the public; patrons must ordinarily identify themselves in order to check out material or to obtain interlibrary loans; and libraries make a record of the material that patrons check out. Those standard operating procedures may deter some persons from using a public library to acquire information, but that does not mean that a library's standard operating procedures are unconstitutional.

In any event, a library has the ability to process anonymous unblocking requests. J.S. App. 173a. As the district court noted, such requests may not always be processed immediately. *Id.* at 174a. But that is also true when a patron requests material that is held in storage or in another branch, or that is available only by interlibrary loan. See PX 61, at CM00097 (Fort Vancouver) (interlibrary loan generally takes about three weeks); PX 66B, at 2 (Tulsa) (interlibrary loan generally takes 2-4 weeks). As these examples

illustrate, the First Amendment does not give a library patron the right to demand that a librarian provide requested information immediately.

2. The district court also identified what it believed to be less restrictive and equally effective ways to preclude library patrons from receiving access to illegal and harmful pornography on library computers. In particular, the court concluded that libraries could make clear to patrons that the library's Internet terminals may not be used to view illegal or harmful content, and that libraries can detect violations through direct observation or through logs that reveal all the sites that a patron selects. J.S. App. 158a-159a. The district court erred in imposing that approach. In deciding what information to collect from the Internet, a public library is not required to satisfy a court that is has pursued the least restrictive alternative. Even if a public library's connection of its computers to the Internet were regarded as creating a nonpublic or a limited public forum, it would have broad discretion to choose among reasonable alternatives in deciding how best to further its mission.

In any event, a system under which librarians closely monitor everyone using computers to make sure that they are not viewing pornographic material would be far more intrusive than the use of filtering software. Such a regime would deeply invade the privacy that patrons ordinarily experience when they peruse materials in a library. It would also significantly alter the experience of everyone visiting the library, including many who prefer to steer clear (and to have their children steer clear) of pornographic Web sites and are quite content to have the library help them do so.

The district court's proposed alternative would also risk transforming the role of a librarian from a professional to whom patrons turn for assistance in finding information into a compliance officer who many patrons might wish to avoid. Such a fundamental change in the relationship between pa-

trons and librarians would undermine rather than promote First Amendment values. Moreover, many librarians (like many patrons) would understandably be uncomfortable viewing pornographic depictions and confronting the patrons who are doing so. J.S. App. 44a. Under the court's alternative, those librarians would be needlessly exposed to material they would prefer not to see, and forced into a role they should not have to play.

The experience of the Greenville County Library System dramatically illustrates why a monitoring program is not a viable alternative to filtering software. In response to the problems associated with library patrons using its computers to view online pornography, Greenville instituted a policy prohibiting patrons from viewing online pornography, relocated all Internet-connected computers so that librarians would have visual contact with them, and entrusted librarians with responsibility to enforce its no-pornography policy. J.S. App. 40a. The result was that the library experienced a high turnover rate among librarians who worked in view of Internet terminals, while patrons continued to view online pornography. *Ibid.* Although the library considered discontinuing Internet access altogether, it ultimately adopted a filtering policy. *Ibid.*

The other alternatives discussed by the district court—moving terminals to places where their displays cannot easily be seen by other patrons, or purchasing privacy screens or recessed monitors (J.S. App. 165a-166a)—would not address a library's interest in preventing patrons from deliberately using the library's computers to view online pornography. To the contrary, by making it more difficult for library officials to monitor activity on the computers, those alternatives would make it easier for patrons to use the library's computers to obtain online pornography.

Even as methods for preventing inadvertent exposure to pornographic material, the additional alternatives discussed

by the district are less effective than filtering software. Placing computers outside of patron sight-lines is constrained by libraries' space limitations and physical layouts. J.S. App. 42a. Privacy screens do not always prevent inadvertent viewing by patrons or librarians who pass by; they make it difficult for patrons to work together at a single terminal; they may be removed by patrons in order to improve the view; and they impose additional costs. *Id.* at 43a, 166a. Recessed monitors pose similar problems. *Ibid.* In contrast, filtering software efficiently addresses the problems associated with both deliberate and inadvertent exposure to online pornography.

F. The Use of Filtering Software Satisfies Strict Scrutiny

Even if strict scrutiny were applicable to a public library's collection of material from the Internet, a public library's use of filtering software to screen out material covered by CIPA would be constitutional. A government program satisfies strict scrutiny when it advances governmental interests that are "compelling" and employs "the least restrictive means" to further those interests. *Playboy Entertainment Group, Inc.*, 529 U.S. at 816. That standard is satisfied here.

The government has a compelling interest in preventing the dissemination of obscenity, *Miller* v. *California*, 413 U.S. 15, 18 (1973), child pornography, *New York* v. *Ferber*, 458 U.S. 747, 757 (1982), and, in the case of minors, material that is harmful to minors, *Ginsberg* v. *New York*, 390 U.S. 629, 637 (1968). In the unique setting of a public library, the government also has a compelling interest in protecting library patrons, including minors, from inadvertent exposure to pornographic visual depictions. Cf. *FCC* v. *Pacifica*, 438 U.S. 726, 748-749 (1978) (plurality opinion); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 302 (1974) (plurality opinion). The use of filtering software is the least restrictive method to further those interests. For the reasons discussed

above, the alternatives identified by the court are either more restrictive or not as effective as filtering software in serving the government's compelling interests.

II. APPELLEES' OTHER CHALLENGES DO NOT PROVIDE AN ALTERNATIVE GROUND FOR AFFIRMANCE

Appellees argue that the district court's judgment may be affirmed on the alternative grounds that CIPA imposes an unconstitutional condition on the receipt of federal assistance, and that a library's use of filtering software constitutes an impermissible prior restraint on speech. ALA Mot. to Aff. 22-26; Multnomah County Resp. 17-19. Those contentions are without merit.

A. CIPA Does Not Impose An Unconstitutional Condition On The Receipt of Federal Assistance

1. Under the doctrine of unconstitutional conditions, "the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech' even if he has no entitlement to that benefit." *Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 674 (1996) (quoting *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972)). Appellees face a threshold barrier to relying on that doctrine. Public libraries that receive federal assistance for Internet access are government entities, and the courts of appeals that have addressed the issue have concluded that government entities do not have First Amendment rights. *Warner Cable Communications, Inc.* v. *City of Niceville*, 911 F.2d 634, 638 (11th Cir. 1990), cert. denied, 501 U.S. 1222 (1991); *NAACP* v. *Hunt*, 891 F.2d 1555, 1565 (11th Cir. 1990); *Student Gov't Ass'n* v. *Board of Trs. of the Univ. of Mass.*, 868 F.2d 473, 481 (1st Cir. 1989); *Estiverne* v. *Louisiana State Bar Ass'n*, 863 F.2d 371, 379 (5th Cir. 1989); *Muir* v. *Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1038

(5th Cir. 1982) (en banc), cert. denied, 460 U.S. 1023 (1983). See *CBS, Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 139 (1973) (Stewart, J., concurring) ("The First Amendment protects the press *from* government interference; it confers no analogous protection *on* the government."); *id.* at 139 n.7 ("The purpose of the First Amendment is to protect private expression.") (quoting Thomas I. Emerson, *The System of Freedom of Expression* 700 (1970)).

Furthermore, if a government entity, such as a public library, does have First Amendment rights, it would be difficult to understand how appellees could defend the district court's holding that CIPA induces public libraries to violate the First Amendment rights of their patrons. If public libraries have a First Amendment right to determine what material to add to their Internet collections, they surely would have a First Amendment right to use filtering software notwithstanding the objections of certain library patrons and web publishers.

Perhaps for those reasons, appellees ultimately do not rely on the First Amendment rights of public libraries in making their unconstitutional conditions claim. Instead, they contend (ALA Mot. to Aff. 23-24) that CIPA imposes an unconstitutional condition on the First Amendment rights of library patrons. But library patrons are not the recipients of the federal assistance, and CIPA therefore does not impose any conditions at all on them. It follows that CIPA does not impose any *unconstitutional* condition on library patrons. As this Court explained in *Rust* v. Sullivan, 500 U.S. 173 (1991), the Court's "'unconstitutional conditions' cases involve situations in which the Government has placed a condition on the recipient of the subsidy, * * * effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally [assisted] program." 500 U.S. at 197 (emphasis omitted). The unconstitutional conditions doctrine

does not apply to non-recipients upon whom no conditions have been imposed.

Moreover, as explained in Point I, a public library's use of filtering software does not violate any First Amendment rights of library patrons. For this reason as well, CIPA's requirement that a library use filtering software as a condition on the receipt of federal assistance for Internet access and related services would not amount to an unconstitutional condition, even if the effect on library patrons were appropriate to consider in the unconstitutional conditions analysis.

2. Assuming *arguendo* that public libraries may assert a First Amendment unconstitutional conditions claim, that claim would lack merit. Within broad limits, "when the Government appropriates public funds to establish a program, it is entitled to define the limits of that program." *Rust*, 500 U.S. at 194. The E-rate and LSTA programs were intended to make federal assistance for Internet access and related services available to public libraries to further their traditional role of obtaining requisite and appropriate material for educational and informational purposes. Especially since public libraries have traditionally excluded pornographic material from their other collections, Congress could reasonably conclude that a parallel limitation is appropriate under its program to assist libraries in expanding their collection activities to include the Internet.

Furthermore, in general, a condition of federal assistance violates the unconstitutional conditions doctrine only when it "prohibit[s] the recipient from engaging in the protected conduct outside the scope of the federally [assisted] program." 500 U.S. at 197 (emphasis omitted). CIPA does not exceed that limitation. A recipient that wishes to offer unfiltered access outside the scope of the federal program may do so—for example, at an affiliated library that does not receive federal assistance for Internet access. ALA errs in contending (ALA Mot. to Aff. 25-26) that CIPA exceeds the

limits of Congress's authority because it applies to all computers at a library facility that receives federal assistance for Internet access and related services, including computers paid for by non-federal funds. Under *Rust*, Congress is entitled to "require a certain degree of separation" from the E-rate and LSTA programs "in order to ensure the integrity" of those programs. 505 U.S. at 198. Permitting public libraries to offer unfiltered access at the very facilities that receive federal assistance for Internet access or related services would undermine the integrity of those federal programs.

Appellees similarly err in contending, in reliance on *Legal Services Corp.*, that CIPA's filtering conditions "distort the usual functioning of public libraries." ALA Mot. to Aff. 24 (quoting *Legal Services Corp.*, 531 U.S. at 543). In *Legal Services Corp.*, the Court concluded that the government program of furnishing legal aid to the indigent differed from the program in *Rust* "in the vital respect" that the role of lawyers supported by federal funds who represent clients in welfare disputes is to advocate *against* the government, and there was thus an assumption that counsel would be free of state control. 531 U.S. at 542-543. The Court concluded that the government-imposed restriction on advocacy in such welfare disputes would distort the usual functioning of the legal profession and the federal and state courts before which the legal aid lawyers appeared. Public libraries, by contrast, have no comparable role that pits them against the government, and there is no comparable assumption that public libraries must be free of any conditions that their benefactors, public or private, might attach to the use of funds or other assistance they donate to facilitate the acquisition of library resources.

Furthermore, the Court indicated in *Legal Services Corp.* that a condition on federal assistance "distorts the usual functioning" of a program in a way that raises First Amend-

ment concerns only when its effect is to suppress speech that is "inherent in the nature of the medium." 531 U.S. at 543. Providing patrons with illegal or harmful pornography is not "inherent" in the role of public libraries in our society. To the contrary, libraries have traditionally excluded such material from their collections. Similarly, providing unfiltered access to the Internet is not "inherent" in the role of public libraries. Libraries have never had as their goal "universal coverage," J.S. App. 34a, and many libraries have found the use of filtering software to be the best way to make material available from the Internet in conformity with their traditional missions. Library Research Center, Univ. of Ill. Grad. Sch. of Lib. & Info. Sci., *Survey of Internet Access Management in Public Libraries* (June 2000) (PX 38); J.S. App. 3a. To the extent that other libraries have reached a different conclusion, they are free to decline federal assistance.

Appellees assert (ALA Mot. to Aff. 24-25) that CIPA distorts the usual functioning of a public library because some libraries have chosen not to use filtering software. As *Rust* makes clear, however, speech-related conditions do not fall outside Congress's authority to define the limits of a federal program simply because a recipient objects to the policy judgment underlying them. In *Rust*, recipients of family planning funds challenged a restriction on abortion counseling on the ground that it interfered with their own judgments that appropriate family planning counseling includes abortion counseling. The Court rejected that claim, holding that Congress has authority to insist "that public funds be spent for the purposes for which they were authorized." 500 U.S. at 196. The Court further explained that "the recipient is in no way compelled to operate a [federal] project; it can simply decline the subsidy." *Id.* at 199 n.5. That analysis is controlling here.

B. A Library That Uses Filtering Software Does Not Impose A Prior Restraint On Speech

Appellees' reliance (ALA Mot. to Aff. 22-23; Multnomah County Resp. 17-19) on the presumption against prior restraints is also misplaced. A library's use of filtering software does not impose a "restraint" on Internet content. Any material blocked by a filter remains on the Internet and may be obtained from millions of computers throughout the world. A library's decision not to provide such material through its own computers is a collection decision, not a restraint on private speech.

Acceptance of appellees' contrary view would lead to the conclusion that a librarian observing a patron viewing hardcore obscenity through the library's computers would have to permit the patron to continue to do so unless and until the library could persuade a court that the material is obscene. See *Conrad*, 420 U.S. at 552-555, 559-560. The same would be true even if the patron were a 12-year old. Appellees' theory would also lead to the conclusion that public libraries engage in prior restraints when they fail to provide pornographic magazines or XXX-rated videos to their patrons. As those examples illustrate, prior restraint doctrine has no application to a public library's collection decisions.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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No. 02-361

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

UNITED STATES OF AMERICA, *et al.*,

Appellants,

—v.—

AMERICAN LIBRARY ASSOCIATION, INC., *et al.*,

Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

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INTRODUCTION

This Court should affirm the unanimous decision of a three-judge court striking down the Children's Internet Protection Act (CIPA), 20 U.S.C. § 9134 (f); 47 U.S.C. § 254 (h)(6), the first statute in our nation's history that imposes federal speech restrictions on local libraries around the country. Based on extensive findings of fact from an eight-day trial, the lower court correctly held that CIPA induces public libraries to violate the First Amendment when they offer free Internet access to patrons. The statute requires libraries to install blocking programs that inevitably censor a substantial amount of protected speech for adults and minors. Indeed no blocking program offers content categories that are limited -- or even tied in any way -- to CIPA's legal definitions of obscenity, child pornography, or material that is "harmful to minors." In contrast to the ineffective blocking programs mandated by CIPA, which are both overly broad and ultimately ineffective, libraries around the country have devised a number of less restrictive ways to assist patrons who wish to avoid content they find offensive. Under this Court's well-established First Amendment rules, CIPA fails the strict scrutiny required of content-based speech restrictions.

Ignoring the extensive trial record, the government argues that CIPA should be upheld under rational basis review because it is consistent with the traditional discretion of libraries to select books for their collections. Yet under CIPA, the federal government, not a local librarian, dictates what speech libraries nationwide must exclude from the patrons. The federal government, not a local librarian, requires library patrons and staff to use blocking programs manufactured by private companies for profit. It does so knowing that these companies: (1) use their own broad content categories to block speech rather than the statute's

legal definitions of unprotected expression; (2) block huge amounts of text though the statute requires blocking of images only; (3) refuse to disclose their secret block lists to the federal government, local governments, or libraries that must install them; and (4) make their decisions without any input from or regard for the views of librarians or local communities, much less prior judicial review. The government also knows that the blocking programs, if installed: (1) will block library patrons and staff from accessing speech that does not meet the categories of the law or the separate, broader categories defined by the private companies; (2) will block speech that local librarians and local communities have chosen to provide to patrons; (3) will block library patrons and staff from reading constitutionally protected speech literally millions of times; and (4) cannot reliably block the speech defined by the statute.

Far from an exercise of local discretion, CIPA substitutes the federal government's judgment for that of librarians. After closely considering local concerns, 93% of all public libraries chose not to mandate the use of blocking programs. The federal government now seeks to override those decisions, and to install private software companies as censors in our nation's libraries. Because CIPA threatens to distort the democratic, speech-enhancing qualities of both public libraries and the Internet, the three-judge court correctly enjoined its enforcement.

COUNTERSTATEMENT OF THE CASE

Two suits challenging the constitutionality of CIPA were filed in the United States District Court for the Eastern District of Pennsylvania, and were consolidated. The plaintiffs in this case (hereinafter "Multnomah plaintiffs") include large urban libraries serving Portland, Oregon and Santa Cruz, California; library systems serving rural and suburban communities in south central Wisconsin and

Westchester County, New York; and state library associations in Connecticut, Maine, and Wisconsin. The Multnomah plaintiffs also include seven individuals who use their local libraries for Internet access. For example, plaintiff Emmalyn Rood used the Internet at her library in her early teens to "research issues relating to her sexual identity." J.S. App. 22a. Finally, the Multnomah plaintiffs include eight Web sites that were blocked by major blocking programs even though they provided no information that was illegal. Two of the Web sites are for political candidates. AfraidtoAsk.com and Planned Parenthood provide medical information about sex. PlanetOut provides information of interest to gay and lesbian communities. *Id.* at 23a-24a.

Pursuant to the statute, a special three-judge court was convened. After a period of discovery, the court held an eight-day trial at which it heard the testimony of twenty witnesses and admitted hundreds of exhibits, including depositions. *Id.* at 6a. On May 31, 2002, before the statute would have required libraries to install blocking programs, the three-judge court unanimously concluded that the statute was unconstitutional and enjoined its application. The court made "extensive findings of fact," *id.* at 7a, that consume almost one hundred pages in the Appendix to the Jurisdictional Statement. The government does not argue that any of these facts are clearly erroneous.

A. The Three-Judge Court's Findings of Fact

1. Public Libraries and Internet Access

The three-judge court made a number of findings about the nature of public libraries and their provision of Internet access to the public. Specifically, the court found that libraries share a common mission to provide patrons with the widest possible range of information and ideas. J.S. App. 33a. *See also e.g.* J.A. 35-36 (Morgan testimony); 79-

80 (Cooper testimony); 423-442 (Chelton Rebuttal Report). That principle was endorsed by all of the librarians that testified below, and is incorporated into the American Library Association's Bill of Rights and Freedom to Read Statement. J.A. 358-50, 366-73 (PX 1, 9). In practice, however, libraries cannot carry every book on their shelves because of limited space. Faced with this physical constraint, librarians apply professional standards to select particular books, tapes, and other materials for their collections in order to meet the needs of their local communities. J.S. App. 35a; J.A. 36 (Morgan testimony).[1] In making these assessments, librarians try to provide library patrons with the books they want to read. Librarians do not, generally speaking, limit their library collections to books that the staff considers "worthy" or "educational." *E.g.* J.A. 79-80 (Cooper testimony); 423-442 (Chelton Rebuttal Report). Libraries routinely provide access to purely recreational material, including some that is sexually explicit. J.S. App. 32a-33a; *See also e.g.* J.A. 40-41 (Morgan testimony); 80, 84-85 (Cooper testimony); 428 (PX 83, Chelton Rebuttal Report).

Librarians also routinely provide patrons with access to materials not in their collections "through the use of bibliographic access tools and interlibrary loan programs." J.S. App. 34a; J.A. 42-43 (Morgan testimony); 83-84 (Cooper testimony). They do not apply selection criteria when using these methods; instead, they provide the patron with any resource they can obtain. J.A. 79-80 (Cooper testimony). Some libraries allow patrons to obtain interlibrary loan materials without going through a librarian. J.A. 83 (Cooper testimony).

[1] For example, one of the branches of the Portland, Oregon library stocks Russian language materials for its Russian émigré population. J.A. 81 (Cooper testimony).

All of the defendants' experts agreed that, either through direct selection or through techniques such as interlibrary loan, libraries should provide patrons with any information they seek so long as the information is legal. J.A. 266-67 (Cronin testimony), 293 (Davis testimony). Librarians are trained to use just about any means to assist a patron in obtaining information he or she seeks. J.S. App. 33-34a. Increasingly, they turn to the Internet, which "vastly expands the amount of information available to patrons of public libraries." J.S. App. 36a.

"The vast majority of public libraries offer Internet access to their patrons." *Id.*; Jt. Trial Stip. para 263. There is an enormous demand for the service. J.S. App. 36a. "Public libraries play an important role in providing Internet access to citizens who would not otherwise possess it." *Id.* Indeed, libraries are the primary source of Internet access for poor families. *Id.* at 36a-37a, 130a.

The court found that the provision of Internet access at public libraries is notably different than the selection of materials for physical collections. *Id.* at 120a-127a. Through the Internet, librarians provide access to a vast range of Internet content regardless of any librarian's judgment that patrons will want to read any particular page or that any particular page meets professional selection standards. *Id.* at 124a. "[W]hen public libraries provide their patrons with Internet access, they intentionally open their doors to vast amounts of speech that clearly lacks sufficient quality to ever be considered for the library's print collection." J.S. App. 123a. Indeed, "almost none" of the Web sites made available will have been reviewed by "either the library's collection development staff or even the filtering companies." *Id.* at 125a, 137a (libraries do not exercise "editorial discretion" on the Internet). Library Internet access works so that "[a]ny member of the public with Internet access could … tonight jot down a few musings

on any subject under the sun, and tomorrow those musings would become part of public libraries' online offerings." *Id.* at 125a. To the extent that libraries find it necessary to place limits on Internet access, the vast majority of libraries merely ration limited resources and make no content-based exclusions. *Id.* at 36a.

2. Statutory Requirements

The Children's Internet Protection Act (CIPA) applies to every local library in the country that receives funds under two popular federal programs. *Id.* at 14a-16a. Under CIPA, libraries must install and operate "technology protection measures" on every computer that provides Internet access. 47 U.S.C. § 254(h)(6); 20 U.S.C. § 9134(f). These measures must be functioning on computers used by staff as well as patrons, adults as well as minors, and computers privately funded as well as those subsidized by the federal program. J.S. App. 18a. When the computer is being used by an adult, the "technology protection measures" must "protect against access" to "visual depictions" that are obscene or child pornography. When the computer is being used by a minor (under 17), it must additionally prevent access to "visual depictions" that are "harmful to minors." 47 U.S.C. § 254(h)(6); 20 U.S.C. § 9134(f); J.S. App. 202a.

The statute applies to any library that receives federal funds from either the "e-rate" program or as an LSTA grant. 47 U.S.C. § 254(h); 20 U.S.C. § 9134; J.S. App. 14a-16a. More than fifty percent of public libraries participate in one or both of these programs; there are over 16,000 libraries nationwide. GX 37 at 4, Public Libraries and the Internet 2000: Summary Findings and Data Tables, Tr. 10/28/02 at 47. If the library is receiving e-rate funding (most libraries do), a library administrator "may disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or other lawful

purpose." 47 U.S.C. § 254(h)(6)(D); J.S. App. 168a n.33. If the library receives no e-rate funding, but does receive LSTA funds, it may disable the "technology protection measure" for adults or minors "for bona fide research or other lawful purpose." 20 U.S.C. § 9134(f)(1) and (3).

3. Available Blocking Programs

Because Internet blocking programs are the only "technology protection measures" currently available for libraries to comply with CIPA, the three-judge court made extensive findings about their operation and efficacy. J.S. App. 48a-94a. Internet blocking programs, or filters, are software products created and sold by private companies for profit. These products categorize and then block speech on the Internet. For example, one well-known product, Websense, has created 30 categories ranging from "Abortion Advocacy" to "Job Search" to "Tasteless" and "Adult." *Id.* at 50-51a. If a library utilizes the software, persons attempting to access a site on the category list will be blocked from doing so. *Id.*

There is no technology in existence, or likely to come into existence, that can "protect against access" to the categories defined by the statute. *Id.* at 6a, 11a, 68a; Jt. Trial Stip. para 274, 291. All of the existing products use categories much less precisely defined, and much broader, than the statute. J.S. App. 49a-51a. None even purports to apply the legal categories defined by the statute. Jt. Trial Stip. para 291. "[T]here is no judicial involvement in the creation of the filtering software companies' category definitions." J.S. App. 51a. All of the existing products apply their categories uniformly without regard to local values or community standards. *Id.*

Although the statute only requires blocking of "visual depictions," none of the available products categorizes based

solely on visual depictions and none blocks visual depictions without also blocking text. *Id.* at 56a, 93a. Neither judges nor librarians are involved in the products' decision to categorize and block particular Web sites. *Id.* at 51a, 53a; Jt. Trial Stip. para 292. Web pages that are blocked by the products are not notified. J.S. App. 53a.

The products consider their block site lists "to be proprietary information, and hence . . . unavailable to customers or the general public for review, so that public libraries that select categories when implementing filtering software do not really know what they are blocking." J.S. App. 7a; Jt. Trial Stip. para 290. Neither the federal government, which mandates its use, nor the librarians who must install it, nor the patrons and staff who must live with it, can obtain a list of the speech that has been blocked. J.S. App. 52a-53a.

All of the parties agreed, and the court found, that all of the available products substantially overblock, *i.e.*, they block sites that do not fit either the category definitions established by the companies or the differently (and more narrowly) defined statutory categories. *Id.* at 7a, 8a, 11a, 12a, 48a-94a. J.A. 131-223 (Nunberg testimony), 295-357 (Edelman testimony), 467-474 (PX 109, Janes report); PX 110-119, 122-123, 128-135, 162A-K, 165-169 (screen shots, lodged with the Court). All of the products also substantially underblock, *i.e.*, they fail to block sites that meet the category or statutory definitions. J.S. App. 22a, 68a-94a.

4. Blocking of Protected Speech

As the three-judge court concluded, the software mandated by CIPA "erroneously block[s] a huge amount of speech that is protected by the First Amendment." J.S. App. 91a; 12a. The court estimated the number of Web pages erroneously blocked to be "[a]t least tens of thousands . . .

even when considered against the filtering companies' own category definitions." *Id.* at 93a. The number that are blocked and do not meet the statute's categories, is "of course much higher." *Id.* The court found that it is difficult to calculate overblocking rates accurately, though a number of witnesses tried. *Id.* at 68a-79a. The court ultimately found that even defendants' expert identified rates of overblocking of "between nearly 6% and 15%." *Id.* at 49a. These rates "greatly understate the actual rates of overblocking that occurs" for a variety of reasons. *Id.* at 79a, 75a-76a. Because of the vast amount of content on the Web and large number of library patrons around the country who access the Internet daily, defendants' expert admitted that even using his estimate, library patrons would be wrongly denied access to Web sites *millions of times*. Finnell testimony 4/1/02 at 178-179.

Multnomah plaintiffs' expert, Mr. Edelman, devised and implemented a process to identify Web pages blocked by four leading commercial blocking programs that do not fit within those programs' self-defined blocking categories. Mr. Edelman first created a database of Web page addresses, including substantial portions of site listings from the popular Yahoo and Google Web directories. Each address from the database was tested against each blocking program to determine which programs blocked which pages. Most of these Web pages were tested multiple times over a period of several months. Edelman submitted a CD-ROM that contained screen shots of over 6,000 sites, most of which the court found were examples of overblocking. J.S. App. 79a-86a; J.A. 467-474 (Janes expert report). The CD-ROM, which has been lodged with the Court, also contains an index to the sites, listing the site name and information about it from the site itself and from the Google and Yahoo index system, the dates on which it was blocked, the product that blocked it, and the product category assigned it. The court found that "many times the number of pages that Edelman

identified are erroneously blocked by one or more of the filtering programs that he tested." J.S. App. 85a-86a.

Largely on the basis of its own analysis of the Edelman CD-ROM, the three-judge court identified a number of specific examples of sites or pages that had been overblocked, whether measured by the statutory categories or the broader product categories. *Id.* at 86a-89a. Each of the plaintiff Web sites was wrongly blocked. J.A. 299 (Edelman testimony); Supp. Lodging 22 (PX 122-23, Edelman CDs). Two of those sites, by Wayne L. Parker and Jeffery Pollock, were created by political candidates to promote their candidacy. J.S. App. 24a. Another site, afraidtoask.com, is operated by a doctor and provides information about medical issues that many people find embarrassing. For example, afraidtoask.com has a section discussing normal variations in penis size. Many of those accessing afraidtoask.com do so through mechanisms that ensure their anonymity. J.A. 237 (Bertman testimony). Another of the sites, planetout.com, is a gay rights site that was one of the sites plaintiff Emmalyn Rood tried to access as she was doing research about her sexual identity. J.A. 223-32 (Rood testimony). In addition, the undisputed evidence at trial showed the following examples of wrongly blocked sites: The Web page of the Republican National Committee, JX 5 at 59, Walker deposition, Tr. 4/3/02 at 90; a Calgary Firefighters Museum site, Supp. Lodging 22, 108-109 (PX 123, 168); a site teaching piano playing, Supp. Lodging 22, 99 (PX 123, 165); the cover of Cosmopolitan magazine, Supp. Lodging 81 (PX 162G); a juggling site, Supp. Lodging 72 (PX 162B); a site about Navy units, Supp. Lodging 19-21 (PX 119); a teen health site on sexually transmitted disease, PX 160A, Tr. 3/28/02 at 217; an abstinence site, Supp. Lodging 22 (PX 123), PX 160E, Tr. 3/28/02 at 217; and a scholarly discussion of biblical attitudes towards homosexuality, PX 160D, Tr. 3/28/02 at 217. The Edelman CD-ROM, provides numerous other

examples. Supp. Lodging 22 (PX 122-23); *See also* J.A. 187-199 (Nunberg testimony); Plaintiffs' Joint Proposed Findings of Fact, 221-263.

Library experts testified that at least several hundred of the examples of overblocking were sites librarians would affirmatively select for the library's collection if traditional selection methods applied to the Internet. J.S. App. 82a n. 17. For example, many libraries affirmatively refer patrons to the site of the Lewis Knighten Cancer Center, but it was blocked. Lipow testimony, 4/2/02 at 153; Supp. Lodging 31 (PX 129). Another site blocked was alphasearch, a major search engine to which many libraries link. Lipow testimony, 4/2/02 at 154; Supp. Lodging 37 (PX 130). All of these sites are collected, and screen shots provided, in Appendix A on the Edelman CD-ROM.

5. The Inevitability of Overblocking

The three-judge court also concluded that all blocking programs *inevitably* overblock and underblock because of limitations inherent in the technology, and made lengthy findings in support of this conclusion. J.S. App. 48a-94a; 150a-151a. It ultimately found that there is no "technology protection measure" that will do what CIPA requires without also blocking access to a vast amount of speech that is constitutionally protected for both adults and minors. *Id.* at 7a, 12a, 13a, 48a-94a. As an initial matter, all of the products necessarily overblock because the categories of speech they use are broader than the categories defined by the statute, and because their blocking decisions are based on text as well as image. *Id.* at 51a, 60a; 74a; *compare* J.S. App. 49a-51a *with* 71a-18a; Jt. Trial Stip. para 312; *see also* J.A. 181 (Nunberg testimony). A number of other factors inevitably cause overblocking.

First, categorizing the Web is an impossible task in part due to "the Internet's size, rate of growth, rate of change, and architecture." J.S. App. 68a, 54a. The majority of Web pages cannot be found by the methods used by the software companies. *Id.* at 28a-29a, 56a. Those pages are accessible through a variety of means by library patrons. *Id.*; J.A. 156, 176 (Nunberg testimony). Even the portions of the Web that software companies can find, the "indexable Web," consists of at least 2 billion pages. J.S. App. 30a. Approximately 1.5 million pages are added each day. J.S. App. 30a; *See also* J.A. 168 (Nunberg testimony). The content of particular Web sites is also highly dynamic, with pages constantly being removed or changed. J.S. App. 29a-30a. "Individual Web pages have an average life span of approximately 90 days." *Id.*

Second, to review all of the dynamic content on the Web, blocking software companies have hired "between eight and a few dozen employees." *Id.* at 60a. Software companies must use a combination of automated search techniques and human review to categorize the vast content on the Web, both of which are subject to serious error. J.A. 162-168 (Nunberg testimony). At least one of the products allows computers to make decisions about sites to block without human review. J.S. App. 60a. These sites are listed solely on the basis of text and without reference to any visual image. Jt. Trial Stip. para 309. The products very rarely review a site again once they have initially categorized it, though content changes constantly. J.S. App. 53a, 64a-65a; Jt. Trial Stip. para 323. It is obvious that a comprehensive review and evaluation of Web sites by these companies is impossible. J.S. App. 68a, 54a.

Third, the products are unable to differentially block access to video files, audio files, chat rooms, or discussion groups. Regardless of whether a movie, for example, contains one or a dozen sexually explicit scenes, the products

must either block or fail to block the entire movie. J.A. 335 (Edelman testimony).

Fourth, the products overblock because they primarily block at the level of the root domain rather than at the level of an individual Web page. J.S. App. 61a. To take one example from the record, at least one product blocks all of the pages in the online magazine Salon (www.salon.com), no matter how innocuous, because there are some pages in Salon that they believe meet their criteria. *Id.* at 62a. There may be hundreds or thousands of pages under a single root URL. Jt. Trial Stip. para 243.

Fifth, the Internet's addressing system causes serious overblocking or underblocking. Every Web page can be located by its Web address (a URL such as www.uscourts.gov) or its IP address (a series of numbers). J.S. App. 26a-28a, 62a. Millions of Web pages with vastly different content may share a single IP address. *Id.* If the software companies fail to block by IP address, users could bypass the blocking program by accessing forbidden sites using the IP address. If the product blocks by IP address, users will be unable to access any of the multiple sites at a given IP address, no matter how harmless the content. *Id.* All of the companies block by IP address as well as URL. J.A. 321 (Edelman testimony). One company said that it received fifty complaints a week about overblocking caused by IP blocking. J.A. 199 (Nunberg testimony).

Sixth, overblocking is caused by so-called "loophole" sites. J.S. App. 62a-64a. Loophole sites allow a user to access a site using a Web address other than its primary address. There are three major kinds of loophole sites: caches (*e.g.*, Google provides its own cache copy of any Web page it indexes), translation sites (which provide a Web page roughly translated into another language), and anonymizers (which allow access to a Web page while

masking the user's identity). *Id.* To take one of these examples: Google searches for Web sites. When it finds a site, such as afraidtoask.com, it automatically makes a copy of that site (in a "cache") and gives it a name such as "http://216.239.57.100/...www.afraidtoask.com..." The entire content of afraidtoask can be accessed from this alternate address as well as afraidtoask's original address. The blocking products must either prevent access to all loophole sites, which "necessarily results in a significant amount of overblocking, because the vast majority of pages that are cached, for example, do not contain content that would match a filtering company's category definitions" or must allow access "thus resulting in substantial underblocking." *Id.* at 64a. The Google cache alone represents hundreds of millions of sites. J.A. 205 (Nunberg testimony). All of the products block loophole sites. J.A. 200, 205 (Nunberg testimony).

Finally, the evidence established that all of the blocking programs also inevitably underblock due to the same inherent technological problems that lead to overblocking. In addition, the companies' human reviewers only review a very small percentage of the Web. The vast majority of Internet content is deemed not to meet the blocking company categories and is thereby excluded from human review by computers using an imprecise and secret method of text analysis. J.S. App. 53a-64a. For that small percentage not excluded by a computer, "[h]uman reviewers generally focus on English language Web sites, and are generally not required to be multi-lingual." *Id.* at 60a. Even with the products engaged, a library patron will be able to find material that meets either the categories of the statute or the categories set by the products. J.A. 179 (Nunberg testimony); *see also* PX 121 at 27-8, Edelman expert report, Tr. 4/2/02 at 127; JX 8 at 12, 164, Dussome deposition, Tr. 4/2/02 at 90; JX 9 at 93, Gallagher deposition, Tr. 4/2/02 at 90; JX 10 at 14, Blakeman deposition, Tr. 4/2/02 at 90.

6. The Inadequacy of CIPA's Unblocking Provisions

The three-judge court also made findings about the feasibility of unblocking sites wrongly blocked by the programs, and the effect of requiring patrons to seek permission to access blocked sites. CIPA allows, but does not require, libraries to unblock sites upon the request of an adult patron (or a minor in some cases) with a "bona fide research or other lawful purpose." 20 U.S.C. §9134(f)(3); 47 U.S.C. §254 (h) (6)(D). All of the blocking software products offer a method for doing some unblocking. J.S. App. 52a.

The feasibility of unblocking according to the requirements of the statute was not established. The products do not permit multiple people to unblock. Thus, only one person in a library system, no matter how large or busy the system, can have authority to unblock. J.A. 336-37, 339 (Edelman testimony). The products also do not permit a librarian to unblock text while continuing to block only a specific visual image or vice versa. J.A. 223 (Nunberg testimony). The government failed to prove that any product was capable of unblocking for adults but not minors, for one patron or one terminal only (as opposed to all patrons or all terminals), or for only a specified time period based on a particular patron's purpose. J.A. 341-342 (Edelman testimony).

Even assuming that unblocking according to the statute were feasible, the court found that "many patrons are reluctant or unwilling to ask librarians to unblock Web pages or sites that contain only materials that might be deemed personal or embarrassing, even if they are not sexually explicit or pornographic." J.S. App. 47a, 172a. For example, plaintiff Emmalyn Rood testified "that she would have been unwilling as a young teen to ask a librarian to

disable filtering software so that she could view materials concerning gay and lesbian issues." J.S. App. 47a. Similarly, plaintiff Mark Brown testified that he would have been unwilling to ask a librarian to unblock a site when doing research on his mother's breast cancer. J.S. App. 172a-73a. Plaintiff Dr. Bertman testified that many users came to his site, afraidtoask.com, through one of the "loophole" methods, an anonymizer, to preserve their anonymity. J.A. 237 (Bertman testimony). Thus, even though he is a physician, and even though his site assures readers that it will protect their privacy, his readers did not even want him to know the address of the computer from which they accessed his information.

The court also found that "[t]he pattern of patron requests to unblock specific URLs in the various libraries involved in this case" confirmed that "patrons are largely unwilling to make unblocking requests unless they are permitted to do so anonymously." J.S. App. 47a. For example, defendants' expert testified that the Greenville Public Library in South Carolina wrongly blocked close to a hundred sites in a two-week period (a serious underestimate of actual overblocking, as the court found), but the library has received only twenty-eight unblocking requests in almost two years. *Id.*

Even when sites were unblocked, the process took "between 24 hours and a week." *Id.* at 46a. Because most libraries have more demand for Internet access than Internet access terminals, they often limit the time each patron may use the computer. J.A. 73-74 (Morgan testimony). Librarians testified that few patrons would interrupt their limited access time to request an override. *Id.*; J.S. App. 174a.

7. The Inability of Any Library To Comply with the Statute

The government did not provide evidence of a single library that was in compliance with the statute. The government offered testimony from some libraries that currently use blocking software. All but one refused to block staff computers, although staff blocking is required by the statute. Ewick testimony 4/3/02 at 31; J.A. 259 (Sudduth testimony). These libraries made both blocking and unblocking decisions based on the categories defined by the software companies, not the more limited categories defined by the statute. JX 1 at 42-43; Dooley Deposition, Tr. 4/3/02 at 90; JX 2 at 35-36, Majilton Deposition, Tr. 4/3/02 at 90; JX 3 at 77, Stewart Deposition Tr. 4/3/02 at 90; JX 4 at 25-26, Saferite Deposition Tr. 4/3/02 at 90; JX 5 at 32-34, Walker Deposition, Tr. 4/3/02 at 90; Biek testimony 3/28/02 at 111-12; James testimony 3/29/02 at 15; Belk testimony 3/29/02 at 58. The Westerville, Ohio and Greenville, South Carolina libraries blocked categories as broad as "tasteless." Barlow testimony 4/1/02 at 26; James testimony 3/29/02 at 16. Though the statute requires blocking only of images, all but one library blocked text as well as images, and made unblocking decisions based on text as well as images. *E.g.* Barlow testimony 4/1/02 at 52-54; James testimony 3/29/02 at 15. Tacoma, which blocked only images, blocked any image, no matter how innocuous, on a page that met the blocking software company's category. Biek testimony 3/28/02 at 48. "None of these libraries [proffered by the government] makes differential unblocking decisions based on the patrons' age. Unblocking decisions are usually made identically for adults and minors. Unblocking decisions even for adults are usually based on suitability of the Web site for minors." J.S. App. 47a; JX 4 at 14, 45, 70, Saferite

deposition, Tr. 4/3/02 at 90; JX 5 at 34, Walker deposition, Tr. 4/3/02 at 90; Biek testimony 3/28/02 at 113; James testimony 3/29/02 at 15; Belk testimony 3/29/02 at 71; Barlow testimony 4/1/02 at 42, 44. The libraries all blocked or unblocked a site for all their patrons for all time; none unblocked for only one patron or for a limited time period. JX 1 at 48-49, Dooley deposition Tr. 4/3/02 at 90; Barlow testimony 4/1/02 at 33; Ewick testimony 4/3/02 at 33, 57. *See also* J.A. 341-42 (Edelman testimony). Though the statute permits unblocking only for "bona fide research purposes," no library used this standard in determining whether to unblock a site. *E.g.* Belk Testimony 3/29/02 at 71-73.

Government witnesses who currently use blocking software in their libraries all admitted that the programs both overblocked and underblocked. *E.g.* J.S. App. 77a-78a. Indeed, even in Tacoma where a librarian claims to review a list of every single site blocked to see if he can find errors, there is still overblocking. *Id.* at 46a, 78a, 173a. Defendants' experts agreed that all of the libraries they studied demonstrated both overblocking and underblocking. *Id.* at 71a-79a. No library was able to unblock sites without a delay, often of up to a week. *Id.* at 174a.

The use of blocking software reached stark levels of irrationality and arbitrariness. For example, in Tacoma, the library on which the government most heavily relied, the witness testified that the software blocked patrons from viewing the pictures in the online version of Playboy magazine. If asked to unblock these pictures, even by a middle-aged, female sex researcher, he said he would refuse to do so. At the same time, the library allowed all patrons, regardless of age, to view the same pictures in Playboy magazine on microfilm machines that were functionally indistinguishable from the library's computers. J.A. 250-252 (Biek testimony).

8. Less Restrictive Alternatives

Prior to the hammerlock imposed by CIPA, more than 90% of public libraries had exercised their local discretion not to require the use of blocking programs, in part because of their deficiencies. J.S. App. 3a, 45a; Jt. Trial Stip. para 271; *see also* J.A. 54 (Morgan testimony); 104 (Cooper testimony). Instead, as the three-judge court found, libraries have developed a variety of methods for assisting patrons in finding the content they want and avoiding unwanted content. J.S. App. 37a-48a.

Some libraries offer patrons the option of voluntarily using blocking software. *Id.* at 45a; J.A. 53 (Morgan testimony). Some of those libraries allow parents to decide whether their child will use blocking software or not. J.A. 53 (Morgan testimony); J.S. App. 162a-163a. When library patrons are given the chance to use blocking software, 80% refuse to use the software. J.A. 56 (Morgan testimony).

Many libraries also offer "training to patrons on how to use the Internet, including how to access the information they want and to avoid the materials they do not want." J.S. App. 41a. Among other things, libraries offer links to sites that have been screened by librarians and found to be especially valuable for library patrons. *Id.* at 41a-42a. These links do "not preclude patrons from attempting to access other Internet Web sites." *Id.* at 42a.

In addition, libraries have devised a variety of techniques for minimizing the risk that a patron will view material he or she finds objectionable on a computer being used by another patron. *Id.* at 42a-44a. Some libraries place their monitors so that it is difficult for non-users to see the screen. Others offer "privacy screens" or provide recessed monitors so that passers-by cannot see another user's screen. *Id.* Other libraries put the monitors in the middle of high

traffic areas to inhibit users from accessing objectionable material. J.S. App. 44a. Libraries also offer software that automatically erases a screen if there is no activity by a patron for a specified time in order to assure that the next user not be subjected to material that user finds objectionable. J.A. 58 (Morgan testimony).

Though the government seeks to justify use of blocking software by describing behavioral problems in the library, the three-judge court found that behavioral problems existed in libraries before there was an Internet and persist even in libraries that use blocking software. Libraries continue to deal with behavior problems by enforcing general behavioral rules. J.S. App. 41a, 146a-47a; J.A. 462-66 (PX 106, Multnomah County Library Policy).

Most libraries also have Internet use policies that prohibit users from accessing illegal material. J.S. 37a. In the event that librarians observe material on a user's Internet screen that is clearly illegal, they can and do call the police. J.A. 61 (Morgan testimony); 453-61 (PX 105, Multnomah County Library policy); *see also* Hamon testimony, 3/25/02 at 217-221.

Methods other than blocking software have proven very effective in minimizing any problems caused by some patrons objecting to material in the library. Libraries that did not use mandatory blocking software testified that they had very few complaints related to the content of Internet sites. J.A. 61-69 (Morgan testimony); 109-111 (Cooper testimony). The three-judge court found that the government had not provided any evidence of the relative feasibility, cost, and effectiveness of these various alternatives to blocking software. J.S. App. 45a, 146a.

B. The Three-Judge Court's Legal Analysis

The three-judge court held that CIPA was unconstitutional because it induces libraries "to engage in activities that would themselves be unconstitutional." *Id.* at 97a. The court analogized to the public forum doctrine, finding that "[a]lthough a public library's provision of Internet access does not resemble the conventional notion of a forum as a well-defined physical space, the same First Amendment standards apply." *Id.* at 108a (citing *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995)). More specifically, the court found that strict scrutiny applies because CIPA – and the blocking programs it imposes – single out disfavored speech for exclusion based on content in a forum otherwise designated for unrestricted expressive activity on a wide range of topics. *Id.* at 118a.

Although the court found that the state would have a compelling interest in preventing access to illegal speech, the government had to prove that CIPA's blocking mandate "is narrowly tailored to further those interests, and that no less restrictive means of promoting those interests exists." *Id* at 148a. "Given the substantial amount of constitutionally protected speech blocked by filters studied," the court concluded that CIPA was "not narrowly tailored." J.S. App. 149a. The court also held that "there are plausible, less restrictive alternatives to the use of software filters that would serve the government's interest." *Id.* at 158a. Finally, the court concluded that the disabling provisions of CIPA did not cure its unconstitutionality. "[T]he content-based burden that the library's use of software filters places on patrons' access to speech suffers from the same constitutional deficiencies as a complete ban on patrons' access to speech that was erroneously blocked by filters, since patrons will

often be deterred from asking the library to unblock a site and patron requests cannot be immediately reviewed." *Id.* at 176a.

SUMMARY OF ARGUMENT

As the three-judge court recognized, "[t]he legal context in which this extensive factual record is set is complex," and "[t]here are a number of potential entry points into the analysis." *Id.* at 9a. Ultimately, under all of the core constitutional principles, CIPA "lacks the precision that the First Amendment requires when a statute regulates the content of speech." *Reno v. American Civil Liberites Union*, 521 U.S. 844, 874 (1997).

1. CIPA regulates protected speech on the basis of its content. Under this Court's longstanding precedents it would clearly be unconstitutional if imposed as a direct mandate on public libraries. *See Reno*, 521 U.S. at 879; *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Butler v. Michigan*, 352 U.S. 380 (1957). CIPA's censorship system is no less constitutional simply because Congress chose to impose it indirectly on libraries. As the government concedes, Congress may not use its spending authority "to induce the States to engage in activities that would themselves be unconstitutional." *South Dakota v. Dole*, 483 U.S. 203, 210 (1987). CIPA fails this test because it induces libraries to use blocking software that *inevitably* blocks access to a huge amount of protected speech.

Internet access at public libraries uniquely promotes First Amendment values. Because CIPA seeks to selectively and arbitrarily exclude protected speech from a vast democratic forum otherwise dedicated to unrestricted online communication, it is properly subject to strict scrutiny.

Applying strict scrutiny, CIPA must be struck down because the government failed to prove it is narrowly tailored to serve a compelling government interest. *See Reno*, 521 U.S. at 879. *Playboy*, 529 U.S. at 813; *Sable*, 492 U.S. at 126.

2. CIPA's blocking mandate also imposes an unlawful prior restraint by effectively silencing speech prior to its dissemination in public libraries, without judicial review or even the semblance of First Amendment due process.

3. As a condition on the receipt of a federal benefit, CIPA is equally unconstitutional. It requires libraries to block speech even where Internet terminals are wholly funded by non-federal dollars, and distorts the usual function of public libraries in providing uncensored access to information on the Internet.

In summary, under any legal theory, government-mandated blocking programs are blunt instruments in an area that requires far more sensitive tools. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963). "The First Amendment requires the precision of a scalpel, not a sledgehammer." J.S. App. 156a. As this Court has explained, and as the case so clearly demonstrates, "the line between speech unconditionally guaranteed and speech which may legitimately be regulated," suppressed, or punished "is finely drawn." *Blount v. Rizzi*, 400 U.S. 410, 417 (1971) (quoting *Speiser v. Randall*, 357 U.S. 513, 525 (1958)). Error in marking that line "exacts an extraordinary cost." *Playboy*, 529 U.S. at 817-18.

ARGUMENT

I. The Three-Judge Court's Injunction Should Be Affirmed Because CIPA Induces Public Libraries To Violate The First Amendment.

A. CIPA's Content-Based Restrictions On Speech Are Subject to Strict Scrutiny.

1. Like Traditional Public Forums, Internet Access at Public Libraries Promotes Core First Amendment Values.

If there was ever a context in which government should not be allowed to impose content controls through its spending power, it is Internet access at public libraries. As the three-judge court correctly found, public libraries and the Internet have many qualities analogous to traditional public forums, which are entitled to the utmost protection of the First Amendment. Sidewalks and public parks are protected by strict scrutiny because their "speech-facilitating character . . . makes them distinctly deserving of First Amendment protection." J.S. App. 129a. Like these traditional forums, Internet access at public libraries "uniquely promote[s] First Amendment values." *Id.* The very purpose of public libraries is to provide free access to books, ideas, resources, and information for education, employment, enjoyment and self-government. J.A. 35-36 (Morgan testimony), 79-80 (Cooper testimony); 423-442 (Chelton Rebuttal Report). The public library is "the quintessential locus for the receipt of information." *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1255 (3d Cir. 1992); *see also Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 582 (6th Cir. 1976) ("A library is a mighty resource in the free marketplace of

ideas.") (citing *Abrams v. United States*, 250 U.S. 616 (1928) (Holmes, J., dissenting); *Sund v. City of Wichita Falls*, 121 F. Supp. 2d 530, 547 (N.D. Tex. 2000) ("The right to receive information is vigorously enforced in the context of a public library."). Like other traditional forums, public libraries are "generally open to any member of the public" who enters them. J.S.App. 129a-130a. By providing free access to information, public libraries have always played an equalizing role that allows all individuals, regardless of their income level, to participate fully in our democracy by becoming informed, literate, educated, and culturally enriched. Especially in public libraries, "the State may not, consistently with the spirit of the First Amendment, 'contract the spectrum of available knowledge.'" *Board of Educ. v. Pico*, 457 U.S. 853, 866 (1982) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965)).

The Internet has now provided unprecedented opportunities to expand the scope of information from around the globe that is available to users in public libraries, at substantially less cost than comparable amounts of printed material. Though the Internet "provides relatively unlimited, low-cost capacity for communication of all kinds," *Reno*, 521 U.S. at 870, large segments of our society still lack access to the Internet at home or work. J.S. App. 36a-37a. "By providing Internet access to millions of Americans to whom such access would otherwise be unavailable, public libraries play a critical role in bridging the digital divide separating those with access to new information technologies from those that lack access." *Id.* at 130a and n.26.

In addition to opening their doors to all members of the public seeking information, public libraries are like traditional public forums because they provide broad access to a wide range of speakers when they offer Internet access. "By providing patrons with Internet access, public libraries in effect open their doors to an unlimited number of potential

speakers around the world, inviting the speech of any member of the public who wishes to communicate with library patrons via the Internet." J.S. App. 134a. As this Court found, content on the Internet is "as diverse as human thought." *Reno*, 521 U.S. at 870.

In fact, the volume and diversity of speech on the Internet "far exceeds the volume of speech available to audiences in traditional public fora." J.S. App. 134a. As this Court explained in striking down prior attempts to censor this important medium,

> Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.

Reno, 521 U.S. at 870. *See also* LESSIG, CODE 167, 185 (1999) ("The architecture of the Internet, as it is right now, is perhaps the most important model of free speech since the founding. . . . The model for speech that the framers embraced was the model of the Internet – distribute, non-centralized, fully free and diverse.").

Because of the Internet's speech-enhancing qualities, "the growth of the Internet has been and continues to be phenomenal," *Id.* at 885. "Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us." *Playboy*, 529 U.S. at 818. Internet access at public libraries "presents unique possibilities for promoting First Amendment values," J.S. App. 136a, and the three-judge court thus correctly held that CIPA's content-based restrictions are subject to strict scrutiny. J.S. App. 138a.

2. Strict Scrutiny Applies Because the Government Seeks to Selectively Exclude Protected Speech From a Vast Democratic Forum.

Library Internet access is also subject to strict scrutiny when viewed as a designated public forum, because the government seeks to selectively and arbitrarily exclude protected speech from a forum otherwise dedicated to unrestricted online communication. A designated public forum is "property that the State has opened for expressive activity by part or all of the public." *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992); *Arkansas Education Telev. Comm'n v. Forbes*, 523 U.S. 666, 678 (1998). Regulation that excludes disfavored content from a designated forum is "subject to the same limitations as that governing a traditional public forum." *Lee*, 505 U.S. at 678; *see also Mainstream Loudoun v. Bd. of Trustees of the Loudoun County Library*, 24 F. Supp. 2d 552, 563 (E.D. Va. 1998); *cf. Kreimer*, 958 F.2d at 1259. The three-judge court correctly noted that "the relevant forum for analysis is not the library's entire collection, which includes both print and electronic media, . . . but rather the specific forum created when the library provides its patrons with Internet access." J.S. App. 108a; *see Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n.*, 460 U.S. 37 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981).

Internet access at public libraries easily qualifies as a designated public forum. As the lower court explained, "where the state designates a forum for expressive activity and opens the forum for speech by the public at large on a wide range of topics, strict scrutiny applies to restrictions that single out for exclusion from the forum particular speech whose content is disfavored." J.S. App. 118a. Conversely, "the more narrow the range of speech that the government

chooses to subsidize (whether directly, through government grants or other funding, or indirectly, through the creation of a public forum) the more deference the First Amendment accords the government in drawing content-based distinctions." *Id.* at 112a. Thus, in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975), this Court applied heightened scrutiny to invalidate a town's exclusion of the rock musical "Hair" from a theater otherwise open for the public at large to use for performances. In *Rosenberger*, 515 U.S. at 833, this Court applied strict scrutiny in striking down funding restrictions on student newspapers because the funding program was designed to "encourage a diversity of views from private speakers." And in *FCC v. League of Women Voters*, 468 U.S. 364 (1984), this Court invalidated prohibitions against editorializing by public radio networks under strict scrutiny because the federal program broadly funded diverse speech on a wide range of subjects. *See also Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543 (2001); *City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976) (holding that school board may not exclude certain speakers from meetings open to direct citizen involvement).

Applying these principles to this case, there may be no better example of a diverse range of speakers, viewpoints, and readers than Internet access at public libraries. "The unique speech-enhancing character of Internet use in public libraries derives from the openness of the public library to any member of the public seeking to receive information, and the openness of the Internet to any member of the public who wishes to speak." J.S. App. 135a-136a. "[B]y providing patrons with even filtered access, the library permits patrons to receive speech on a virtually unlimited number of topics, from a virtually unlimited number of speakers, without attempting to restrict patrons' access to speech that the library, in the exercise of its professional

judgment, determines to be particularly valuable." *Id.* at 121a.

When public libraries provide Internet access, they "create[] a forum for the facilitation of speech, almost none of which either the library's collection development staff or even the filtering companies have ever reviewed." *Id.* at 125a. By forcing libraries to use blocking programs, CIPA "risk[s] fundamentally distorting the unique marketplace of ideas that public libraries create when they open their collections, via the Internet, to the speech of millions of individuals around the world on a virtually limitless number of subjects." *Id.* at 126a.

Because CIPA is properly subject to strict scrutiny, it is presumptively invalid, and must be struck down unless the government can prove it is narrowly tailored to serve a compelling government interest. *See Reno*, 521 U.S. at 879; *Playboy*, 529 U.S. at 813; *Sable*, 492 U.S. at 126. Over ninety pages of factual findings, none disputed by the government, establish that the government failed to meet their burden in this case.

B. CIPA's Content-Based Restrictions Fail Strict Scrutiny.

1. The Mandated Use of Blocking Programs Is Not Narrowly Tailored To Prevent Access to Illegal Speech.

As the three-judge court's detailed findings clearly establish, CIPA suppresses a vast amount of Internet content, that is fully protected by the First Amendment, and is thus not narrowly tailored to serve the government's interest in prohibiting access to illegal images. Blocking programs "block many thousands of Web pages that are clearly not harmful to minors, and many thousands more pages that,

while possibly harmful to minors, are neither obscene nor child pornography." J.S. App. 148a-149a. Even the defendants' own expert concluded that "between 6% and 15%" of blocked Web pages contain no content that meets "even the filtering products' own definitions of sexually explicit content, let alone the legal definitions of obscenity or child pornography." *Id* at 149a. This evidence "significantly underestimate[s] the amount of speech that filters erroneously block, and at best provide[s] a rough lower bound on the filters' rates of overblocking."[2] *Id.* Defendant's expert conceded that even using his estimate, library patrons would be wrongly denied access to Web sites millions of times. Finnell testimony 4/1/02 at 175-179.

Indeed, given the fundamental flaws of blocking programs, the three judge court found that the mandatory use of such programs by public libraries is inherently too blunt a tool to satisfy the constitutional requirements of narrow tailoring. J.S. App. 152a. "[A]ny technology protection measure that blocks a sufficient amount of speech to comply with CIPA . . . will necessarily block substantial amounts of speech that does not fall within these categories." *Id.* at 151a. Because automated methods of reviewing content are severely flawed,

> [f]iltering companies are left with the Sisyphean task of using human review to identify from among the approximately two billion Web pages that exist, the 1.5 million new pages that are created daily, and the many thousands of pages whose content changes from day to day, those particular Web pages to be blocked.

Id. at 150a. To cope with the Web's size, blocking programs use a variety of techniques, which necessarily cause them to block protected content. See also Section A5, *supra*.

They routinely block every page of a Web site that contains only some content falling with the companies' own definitions; they block text as well as images; they block entire Web sites containing fully protected speech simply because those sites share IP addresses with sites that fall within their category definitions; they block access to entire video files, audio files, chat rooms, and discussion groups regardless of how little content meets their category definitions; and they generally fail to review pages again once categorized to determine whether the content has changed. J.S. App. 150a.

"[T]he filters required by CIPA block substantial numbers of Web sites that even the most puritanical public library patron would not find offensive." J.S. App. 155a. For example, the products blocked the Lakewood High School alumni page and a political party in Uganda. J.A. 318; 326 PX 166, 169 (screen shot). They also blocked a soccer site in the United Kingdom and *The Journal of Contemporary Obituaries.* PX 162 I, 162 K (screen shots, lodged) Finnell testimony 4/1/02 at 161-169.

The government failed to produce evidence of *any* blocking program "that avoids overblocking a substantial amount of protected speech." *Id.* at 151a. Yet it contends that blocking millions of Web pages, most with content

[2] The government's argument that plaintiffs' expert testimony established only a 1% overblocking rate is a shocking mischaracterization of the evidence and the court's findings. Govt. Br. at 34-35. Edelman specifically testified that his research did not attempt to establish an overblocking percentage, due to the inherent difficulties of doing so. J.A. 296-306, 350-356 (Edelman testimony). The court itself issued detailed factual findings about those difficulties, J.S. App. 85a (accepting government argument that Edelman's results cannot be generalized beyond his 6,775 sites), and found that all of the evidence significantly *underestimated* the actual amount of overblocking. *Id.* at 85a-86a.

nowhere close to the line of illegal speech, is a "negligible" side effect of its mission to prevent access to illegal speech. As this Court said just last term, "[t]he argument . . . that protected speech may be banned as a means to ban unprotected speech . . . turns the First Amendment upside down. The Government may not suppress lawful speech as the means to suppress unlawful speech." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389, 1401 (2002).

Just as all programs necessarily overblock, they all necessarily fail to block access to sites that clearly fall within their own category definitions for sexually explicit material, and that may be illegal. J.S. App. 65a-66a. Because of the nature of all classification systems, "[t]here is an inherent tradeoff between any filter's rate of overblocking . . . and its rate of underblocking." *Id.* at 66a. The government's library witnesses who used blocking programs all experienced underblocking problems in their libraries. *Id.* at 77a. Even with blocking programs installed, then, any determined patron will easily be able to access sexually explicit material on library computers. J.A. 179 (Nunberg testimony). CIPA fails to achieve the government's goal to prevent access to illegal material "in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 624 (1994). As Justice Scalia wrote in *The Florida Star v. B.J.F.*, "a law cannot be regarded as . . . justifying a restriction upon truthful speech, when it leaves appreciable damage to [defendant's] supposedly vital interest unprohibited." 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring). CIPA clearly fails the strict scrutiny required when fundamental First Amendment rights are at stake. *Reno*, 521 U.S. at 874.

2. Libraries Have Other Less Restrictive Means to Help Patrons Find What They Want and Avoid Unwanted and Illegal Content.

Even assuming that the breadth of CIPA's impact on protected speech could ever be justified, *see Butler v. Michigan*, 352 U.S. 380 (1957), the government clearly failed to meet its "heavy burden . . . to explain why a less restrictive provision would not be as effective as [CIPA]." *Id.* at 879. As the three-judge court found, a number of alternative methods further the government's stated interests in a manner far less burdensome on protected speech than the mandatory use of blocking programs for all adults and all minors, including library staff. J.S. App. 157a-167a; see generally Section A8, *supra*. The vast majority of America's libraries use these methods, and not mandatory blocking for adults, to help patrons find information they want and avoid unwanted and illegal content. Plaintiffs' libraries testified that they receive few complaints when using these methods. *Id.* While these alternatives may not be perfect, the government failed to prove that they are less effective than blocking programs. As the lower court found, the government offered no data "comparing the use of library computers to access child pornography and . . . obscenity in libraries that use blocking software and in libraries that use alternative methods." *Id.* at 161a. Especially because blocking programs are themselves far from effective, "[i]t is no response that [a less restrictive alternative] . . . may not go perfectly every time." *Playboy*, 529 U.S. at 824.

In particular, almost all libraries have Internet use policies that forbid access to illegal content.

> Libraries can ensure that their patrons are aware of such policies by posting them in prominent places in the library, requiring patrons to sign forms agreeing to comply with the policy before the library issues library cards to patrons, and by presenting patrons, when they log on to one of the library's Internet terminals, with a screen that requires the user to agree to comply with the library's policy before allowing the user access to the Internet.

J.S. App. 158a. Almost all libraries also offer training in Internet usage, and provide lists of Web sites selected by librarians as appropriate for children or of particular relevance to their local communities. Section A8, *supra*. Some libraries place unblocked computers in well-trafficked areas to discourage violations of Internet use policies. Other libraries have installed privacy screens or recessed monitors, or have segregated computer terminals, to prevent unwanted exposure to material viewed by others. J.S. App. 165a-166a.

Similar alternatives exist to prevent minors from accessing material harmful to minors. Some libraries also offer the *optional* use of blocking software. Others have policies that allow parents to decide whether their children will use blocking programs, or policies that require only younger children to use them. *Id.* at 162a-163a. CIPA replaces parental decision-making about appropriate Internet use with the federal government's blanket judgment. "A court should not assume that a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act." *Playboy*, 529 U.S. at 824. In sum, the government "failed to show that the less restrictive alternatives . . . are ineffective at furthering the government's interest." J.S. App. 167a.

C. The Disabling Provisions Fail to Cure CIPA's Defects.

The three-judge court held that CIPA's disabling provisions do not cure its constitutional defects. J.S. App. 167a-177a. For a host of reasons, that conclusion was correct. As an initial matter, libraries that receive e-rate funding may only override the software for *adults* with "bona fide research or other lawful purpose[s]." 47 U.S.C. § 254(h)(6)(D). For teenagers in thousands of libraries across the country, the provision is no help at all in alleviating CIPA's tremendous overblocking of protected speech. Furthermore, any inquiry into a patron's purpose is contrary to good librarianship. J.A. 122 (Cooper testimony).

The provisions are also unworkable for practical reasons. It is not possible to unblock visual images without also unblocking text and vice versa. Section A6, *supra*. The government also failed to prove that any software permits unblocking for a single patron based on his purpose, while continue to block access by those with less "bona fide" purposes. *Id.* In addition, processing unblocking requests could take up to a week. J.S. App. 46a.

To make matters worse, the unblocking provisions are impossibly vague. J.S. App. 167a-170a. The statute refers to the patron's "purpose" and not the nature of the site. Thus, it appears to require librarians to inquire into the "bona fide" nature or "lawfulness" of the patron's purpose in seeking to access a site regardless of whether the site is illegal. The government asks the Court to ignore the word "purpose" and to treat the provision as permitting unblocking of any lawful site. But this interpretation would render the "bona fide research" language superfluous.

Even assuming the government's interpretation would provide any useful guidance to librarians, it would

place librarians in the business of making essentially unreviewable decisions concerning the legal categories of obscenity. This Court has repeatedly required that those decisions be made by courts, not by administrative officials, even in the context of non-criminal proceedings. *Blount v. Rizzi*, 400 U.S. 410 (1971); *Bantam Books v. Sullivan*, 372 U.S. 58 (1963). Librarians have repeatedly disavowed any expertise in making these legal judgments and expressed certainty that the provision would result in arbitrary and inconsistent judgments by different individual librarians with different values and concerns. J.A. 124 (Cooper testimony).

Finally, even putting aside the provision's infeasibility, vagueness, and delegation of judgments to administrative officials, the disabling provision still unconstitutionally deters patrons from accessing protected speech. As the lower court held, the "requirement that library patrons ask a state actor's permission to access disfavored content violates the First Amendment." J.S. App. 170a. This Court has struck down numerous content-based restrictions that require recipients to identify themselves before being granted the right to access or communicate disfavored speech. *See, e.g., Lamont v. Postmaster General*, 381 U.S. 301 (1965) (invalidating federal statute requiring postmaster to halt delivery of communist propaganda absent affirmative request); *Denver Area Educ. Telecom. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (striking down federal law requiring cable users to request sexually explicit programming in writing); *Playboy*, 529 U.S. at 803 (invalidating law requiring cable users to request access to scrambled sexually explicit programming). As this Court explained just last term, "It is offensive -- not only to the values protected by the First Amendment, but to the very notion of a free society -- that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so." *Watchtower Bible & Tract Society of New*

York, Inc. v. Village of Stratton, 536 U.S. 150, 122 S.Ct. 2080, 2089 (2002) (striking down local ordinance that prohibited door-to-door canvassers from "promoting any cause" without first obtaining a permit). It is equally offensive that a citizen must obtain government approval before accessing protected but disfavored speech on the Internet in her public library.

The deterrent effect of the disabling provisions is "a matter of common sense as well as amply borne out by the trial record." J.S. App. 172a. For example, plaintiff Emmalyn Rood testified that as a gay teen she would have been unwilling to ask a librarian to disable blocking programs so that she could research issues related to her sexual identity. J.S. App. 47a. Plaintiff Mark Brown would have been equally embarrassed to ask a librarian to unblock sites when he was researching his mother's breast cancer. *Id.* at 172a-73a. Many patrons would also not want to relinquish precious time during their Internet sessions to request unblocking that may take up to week. J.A. 127 (Cooper testimony); J.S. App. 46a. Significantly, the three-judge court found that the reluctance of patrons to request unblocking is also established "by the low number of patron unblocking requests, relative to the number of erroneously blocked Web sites, in those public libraries that use software filters and permit patrons to request access to incorrectly blocked Web sites." *Id.* at 173a.

Ignoring specific findings of the three-judge court, the government argues that requiring patrons to ask permission to view blocked sites is no different than other questions patrons ask of librarians daily. The analogy misses the mark. Librarians know from experience that patrons are unwilling to discuss their private concerns, and for that reason offer services to allow patrons to ask questions of librarians, or check out books, even through interlibrary loan, anonymously. J.A. 83 (Cooper testimony). Library patrons

can generally access print material without identifying themselves, by simply taking a book off a shelf and reading it at a library desk.

Even more fundamentally, asking a librarian to unblock a site that may be illegal is vastly different than asking for help to find a book. When a book is in the library's catalogue, the library has sent the unmistakable signal to the patron that it will assist the patron in getting that book. When a patron attempts to access an Internet site and is presented with a message, "THIS SITE IS BLOCKED BY THE LIBRARY DUE TO FEDERAL LAW REQUIRING BLOCKING OF OBSCENITY AND OTHER ILLEGAL SPEECH," the patron is sent an equally unmistakable signal that the library disapproves of the site. The patron may not know that the decision to block the site was not made by a librarian, but by an employee of a software company in California. The patron may also not know that the software is astonishingly inaccurate. For example, if the software blocks the Republican National Committee Web site, the patron may wrongly conclude that the site is mis-named and is really a site with sexually explicit material. The deterrent effect of the disabling provisions thus far exceeds even the common reluctance of patrons to seek assistance.

Given the content-based burden the disabling provision imposes on protected speech, and its strong deterrent effect, the provision "fail[s] to cure CIPA's lack of narrow tailoring." *Id.* at 177a; *see also Playboy*, 529 U.S. at 812 ("It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree").

D. The Government's Arguments Ignore the Record and Misconstrue the Relevant Law.

Rather than grapple with the findings and overwhelming evidence against them, the government argues that the First Amendment is practically irrelevant to this case because CIPA's federal filtering requirement is consistent with a library's traditional collection decisions and thus subject only to rational basis review. This analysis ignores the three-judge court's specific findings to the contrary, and is flawed in numerous ways. First, CIPA imposes the federal government's censorship standard on libraries nationwide, and is thus a far cry from a library's exercise of its own editorial judgment. Indeed, 93% of libraries had already decided, after much review, *not* to mandate filters for all users. CIPA directly overrides those local decisions. Mandated filtering under CIPA, by definition, *eliminates* rather than preserves library discretion.[3]

Second, the lower court found that there are "fundamental differences" between the book selection process and the provision of Internet access. J.S. App. 124a. Unlike decisions to include books in their print collections, when offering Internet access librarians do not exercise editorial discretion and select only pre-approved speech for inclusion. When public libraries provide patrons with Internet access, they allow any member of the public to

[3] The government also implies that under the three-judge court's rationale, there would be a "perverse incentive" for public libraries to make available less information to preserve their discretion. The government offered no evidence at trial to support the theory that libraries would offer access only to preselected sites if they could not mandate filters. Their own witnesses specifically rejected that approach. J.S. App. 42a.

receive speech "from anyone around the world who wishes to disseminate information over the Internet." *Id.* at 137a-138a. CIPA is thus easily distinguishable from cases cited by the government which upheld the government's exercise of editorial discretion in selecting certain speech for inclusion in a state-created forum. As the three-judge court explained, in those cases "the state actor exercising the editorial discretion has at least reviewed the content of the speech that the forum facilitates." J.S. App. 121a (citing *NEA v. Finley*, 524 U.S. 569 (1998) (NEA examined the content of artworks it chose to subsidize on the basis of artistic excellence); *Forbes*, 523 U.S. at 673 (public broadcaster specifically reviewed and approved each speaker permitted to participate in debate). In providing patrons with even filtered Internet access, "a public library creates a forum for the facilitation of speech, almost none of which either the library's collection development staff or even the filtering companies have ever reviewed." *Id.* at 125a, 123a, 7a. Unlike a public library's decision to carry books on a selected topic, "members of the general public . . . define the content that public libraries make available to their patrons on the Internet." *Id.* at 124a-125a. Moreover each of the cases cited by the government involved practical limits on the number of speakers that could be accommodated; these limits simply do not apply to Internet access.

Third, the government again misstates the record when it suggests that using filters is akin to the reliance by some libraries of third-party vendors or book reviews to make book selection decisions. Govt. Br. at 27. These resources are a transparent means of assisting librarians in including material in their collections. As the three-judge court specifically found, when using these resources "librarians still retain ultimate control over their collection development and review all of the materials that enter their library's collection." J.S. App. 35a; see also *Id.* at 123a. In stark contrast, blocking programs censor rather than select,

and libraries have no idea what Web sites the program ultimately blocks. *Id.* at 125a.

Fourth, the government argues that there is no tenable ground for subjecting book collection to rational basis review and Internet access to strict scrutiny. Yet this Court has recognized that there may well be different types of forums, subject to differing levels of scrutiny, within the same physical space or organizational structure. So, for example, a televised debate with "an open-microphone format" is subject to strict scrutiny, while a debate in which the same station controls the content is not. *Forbes*, 523 U.S. at 680; *cf. Cornelius*, 473 U.S. at 801-02 (recognizing that different standards would apply to the federal charity drive than to the federal workplace generally); *Widmar*, 454 U.S. at 264 (applying different standard to university meeting facilities than to state university generally). In addition, the issues that warrant less-than-strict-scrutiny in collection decisions (the necessity of choice, in light of cost and space constraints), are simply not present when Congress mandates censorship at public library Internet terminals nationwide.

Fifth, the government argues that the three-judge court's approach must be wrong because it "would risk transforming the role of public libraries in our society." Govt. Br. at 19. That argument is exactly backward. In fact, it is CIPA that risks changing librarians from information providers into censors. CIPA forces libraries to install filters that, out of the "vast democratic forum" of the Internet, "single out for exclusion particular speech on the basis of its disfavored content." *Id.* at 138a.

Finally, the government suggests that mandated filtering is reasonable because "a library patron would only infrequently need to have access to a Web site that has been blocked in order to obtain the information he or she seeks."

Govt. Br. at 34. This argument approaches the absurd. It implies that the Internet contains only facts, and not fiction, art, opinion, and vast amounts of unique expression. By analogy, the government would hardly sanction the removal of Edgar Allen Poe from library shelves because Charles Dickens remains available, or suggest the painter Yves Tanguy as an appropriate substitute for Frida Kahlo, or the Beatles for Beethoven. Even Web sites containing factual information can, of course, be unique. Plaintiff Jeffrey Pollock used his Web site to promote his campaign for Congress; when it was blocked, it was little comfort that Web users could reach his opponent's site. This Court has held that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Reno*, 521 U.S. at 880. The government suggests an even more twisted re-writing of the First Amendment: that one speaker may be silenced so long as another remains free to speak.[4]

II. CIPA Imposes A Prior Restraint On Speech.

CIPA's blocking mandate also imposes an unlawful prior restraint by effectively silencing speech prior to its dissemination in public libraries, without judicial determination or even the semblance of First Amendment due process. *See generally, Freedman v. Maryland*, 380 U.S. 51, 58 (1965) (invalidating film censorship statute as prior restraint because it lacked several procedural safeguards necessary "to obviate the dangers of a censorship system"). Though the three-judge court did not reach plaintiffs' prior restraint argument, it warrants analysis as an

[4] CIPA would clearly fail constitutional scrutiny even under rational basis review. There may be no better example of irrationality than mandated government use of a product that secretly categorizes and blocks a huge amount of speech that comes nowhere close to the type of content the law was intended to restrict

independent reason for striking down the statute. The only other court to consider the constitutionality of mandatory Internet blocking at a public library invalidated the practice as a prior restraint. *See Mainstream Loudoun*, 24 F. Supp. 2d at 570 (because mandatory blocking policy "has neither adequate standards nor adequate procedural safeguards," it is an unconstitutional prior restraint). By mandating the use of blocking programs that block speech that is not even close to the line between protected and unprotected speech, CIPA imposes a classic system of prior restraint which presumptively violates the Constitution. *See Near v. Minnesota*, 283 U.S. 697, 713 (1931) (stating that "the chief purpose of the [First Amendment] is to prevent previous restraints upon publication"). Blocking programs function literally as automated censors, blocking speech in advance of any judicial determination that it is unprotected. They arbitrarily and irrationally block thousands of Web pages that are fully protected. In this Court's words, "[t]his is . . . the essence of censorship." *Id.*

A postmaster who opened all letters and refused to deliver letters with the word "sex" in them would clearly be violating the First Amendment's rule against prior restraints. *See Blount v. Rizzi*, 400 U.S. 410 (1971) (striking down statute that allowed Postmaster General to halt use of mail for commerce in allegedly obscene materials). As the Court has explained, "[t]he United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues." *Id.* at 416 (citations omitted). Similarly, having chosen to fund Internet access, the government "may not thereafter selectively restrict certain categories of Internet speech because it disfavors their content." *See Mainstream Loudoun*, 2 F. Supp. 2d at 795-96.

"[A]ny system of prior restraints of expression comes to [the court] bearing a heavy presumption against its

constitutional validity." *Bantam Books*, 372 U.S. at 70 (morality commission, whose purpose was to recommend prosecution of obscenity, imposed unconstitutional prior restraint by sending notices to booksellers that certain books were objectionable); *see also Conrad*, 420 U.S. at 559 (municipal board's denial of permission for performance of the rock musical "Hair" at a city auditorium, because of reports that the musical was "obscene," was an unconstitutional prior restraint); *Drive In Theatres, Inc. v. Huskey*, 435 F.2d 228, 230 (4th Cir. 1970) (invalidating as "unconstitutional prior administrative restraint" a sheriff's practice of seizing and terminating exhibition of R-rated movies).

The government argues that a library's use of filters is no more a prior restraint than a library's decision not to subscribe to Playboy. But CIPA is a federal mandate for all libraries nationwide who participate in much-needed funding programs, not a local library book collection decision.

The government once again argues that the speech can be obtained elsewhere. Once again, this court has rejected that argument. *Reno*, 521 U.S. at 880. Surely Dallas could not have defended its movie censorship on the grounds that the movie could be seen in Houston or, at a later time, it was available on video. *Interstate Circuit v. Dallas*, 390 U.S. 676 (1968). In addition, for many Americans, their only means of accessing the Internet is at a library. Section A1, *supra*.

In marked contrast to the local book selection process, CIPA cuts libraries out of the decision-making process entirely. In fact, by delegating the authority to restrict speech to third-party, non-governmental actors who will not reveal what they are censoring, or the rules being used, CIPA compounds the constitutional infirmities inherent in any prior restraint. Additionally, the government's

argument ignores the public forum qualities of the Internet even in public libraries. There is no question that the decisions of blocking programs "to list particular publications as objectionable do not follow judicial determinations that such publications may lawfully be banned." *Bantam Books*, 372 U.S. at 70. CIPA's disabling provisions inflict further First Amendment injury by vesting librarians with unbridled discretion to undo selectively the blocking companies' censorship decisions. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992) ("The First Amendment prohibits the vesting of such unbridled discretion in a government official"); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969) ("a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license" is unconstitutional absent "narrow, objective, and definite standards to guide the licensing authority"). CIPA's censorship system comes nowhere close to the judicial review that is required when First Amendment rights are at stake. *See, e.g., Freedman*, 380 U.S. at 58-59.

III. CIPA Imposes an Unconstitutional Condition on Funding of Internet Access at Public Libraries.

CIPA is also an unconstitutional condition on the receipt of a federal benefit. *See Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). The statute requires any library that participates in the e-rate or LSTA programs to install blocking software on "*any* of its computers with Internet access" during "*any* use of such computers." 20 U.S.C. 9134(f)(1)(B); 47 U.S.C. § 254(h)(6)(C) (emph. added). CIPA requires libraries to block speech even where Internet terminals are wholly funded by non-federal dollars. This Court invalidated exactly that practice in *League of Women Voters*, holding that the government may not use its spending

power to bar grantees "from using even wholly private funds to finance its" expressive activity. 468 U.S. at 400.

Although the three-judge court did not rule on plaintiffs' unconstitutional conditions claim, it included a lengthy footnote analyzing the relevant cases. J.S. App. 180a-188a n.36. Because "the First Amendment is not phrased in terms of who holds the right, but rather what is protected," J.S. App. at 183a n.36, plaintiffs clearly have a valid unconstitutional conditions claim based on the First Amendment rights of their patrons.[5] *See, e.g., Procunier v. Martinez*, 416 U.S. 396, 409 (1974) (recognizing that First Amendment protects the right to receive information); *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988) (booksellers have standing to sue on behalf of their customers); J.S. App. 188a n.36. As this Court has explained, "the question must be whether [the government is] abridg[ing] expression that the First Amendment was meant to protect." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). Contrary to the government's argument, then, it is irrelevant that CIPA imposes its conditions on libraries rather than on their patrons directly. Govt. Br. at 41. This Court has previously entertained unconstitutional conditions claims both by the organizations that receive federal funding and their constituents. *See e.g., Velazquez*, 531 U.S. at 537 (lawyers and clients sued to declare restriction on advocacy invalid); *Rust v. Sullivan*, 500 U.S. 173, 181 (1991) (doctors and patients sued to invalidate restriction on use of Title X funds); *League of Women Voters*, 468 U.S. at 370 n.6 (station owner and viewers sued to invalidate conditions on station's receipt of federal funds).

[5] Thus, this Court need not decide whether public libraries, as municipal entities, have their own independent First Amendment rights.

In *Velazquez*, the Court invalidated a restriction on funding because the program funded private speech, not governmental speech, and because the restriction distorted the traditional function of the medium. 531 U.S. at 544-45. Similarly, CIPA distorts the usual function of public libraries to provide uncensored access to information. The Legal Services Corporation ("LSC") was established to distribute federal funds to eligible local grantee organizations "for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." *Id.* at 536. Congress, however, prohibited legal representation funded by recipients of LSC moneys if the representation involved an effort to amend or otherwise challenge existing welfare law. *Id.*

The Court held that this condition on the use of LSC funds violated the First Amendment rights of LSC grantees and their clients.[6] When the government "designs a program to facilitate private speech, and not to promote a governmental message," and "seeks to use an existing medium of expression and to control it . . . in ways which distort its usual functioning," the distorting restriction must be struck down. *Id.* at 534 ("[r]estricting LSC attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys"). *See also League of Women Voters*, 468 U.S. at 396-97 (prohibitions against editorializing by public

[6] *Velasquez* also condemned the program because it required viewpoint discrimination. 531 U.S. at 533, citing *Board of Regents v. Southworth*, 529 U.S. 217, 229 (2000). Because blocking programs make their censorship decisions in secret, there is no way to know whether they are viewpoint discriminatory. For example, blocking programs may block content targeted to the gay and lesbian community not because it is actually sexually explicit, but because the vendors disapprove of that lifestyle. The potential for viewpoint discrimination certainly adds to its constitutional defects. *See Mainstream Loudoun*, 24 F. Supp. 2d at 565-67.

radio networks were an impermissible restriction, even though the government enacted the restriction to control the use of public funds; First Amendment forbade the government from using the forum in an unconventional way to suppress speech inherent in the nature of the medium). When the government conversely "establishes a subsidy for specified ends," "certain restrictions may be necessary to define the limits and purposes of the program." *Id.* (citing, *inter alia, Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, (1983); *Rust v. Sullivan*, 500 U.S. 173 (1991)).

CIPA seeks to distort an existing medium of expression at public libraries by requiring them to:

> (1) deny patrons access to constitutionally protected speech that libraries would otherwise provide to patrons; and (2) delegate decision making to private software developers who closely guard their selection criteria as trade secrets and who do not purport to make their decisions on the basis of whether the blocked Web sites are constitutionally protected or would add value to a public library's collection.

J.S. App. 187a n.36. Like the improper effect of the funding restriction this Court invalidated in *Velazquez*, "[b]y interfering with public libraries' discretion to make available to patrons as wide a range of constitutionally protected speech as possible, the federal government is arguably distorting the usual functioning of public libraries as places of freewheeling inquiry." J.S. App. 187a n.36.

CONCLUSION

For the reasons stated above, the judgment of the three judge court should be affirmed.

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Supreme Court of the United States

UNITED STATES OF AMERICA, *et al.*,
Appellants,

v.

AMERICAN LIBRARY ASSOCIATION, INC., *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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QUESTIONS PRESENTED

1. Whether the Children's Internet Protection Act (CIPA) induces public libraries to violate the First Amendment.

2. Whether CIPA imposes unconstitutional conditions on funding to public libraries in violation of the First Amendment.

PARTIES

All parties to the proceedings are set forth in appellants' Jurisdictional Statement.

Appellees joining this brief are: American Library Association, Inc.; Freedom to Read Foundation; Alaska Library Association; California Library Association; New England Library Association; New York Library Association; Association of Community Organizations for Reform Now; Friends of the Philadelphia City Institute Library; Pennsylvania Alliance for Democracy; Elizabeth Hrenda; and C. Donald Weinberg.

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This case raises the question whether Congress may use federal funding conditions to impose sweeping, unprecedented speech restrictions on public libraries nationwide. The unanimous three-judge district court correctly held, based on extensive evidence and uncontested findings, that CIPA induces public libraries to violate the First Amendment by mandating the use of Internet blocking software by adult patrons, children, and even library staff. Although the Government attempts to shield CIPA from any heightened constitutional scrutiny, the First Amendment applies with full force to a library's provision of public access to the Internet, a boundless medium dedicated to free and open expression. A public library may not, consistent with the First Amendment, open that vast portal of private communication and then exclude one subset of disfavored speech using a wildly imperfect, content-based screen. The district court's undisputed findings - largely ignored by the Government - establish that filtering software inevitably blocks access to a tremendous amount of fully protected Internet expression. CIPA's broad filtering mandate is particularly egregious, given the availability of numerous effective, less-restrictive alternatives for managing public library Internet access. And even if, as the Government argues, libraries have discretion to choose how to provide public Internet access based on their particular local circumstances and needs, CIPA's nationwide filtering directive is still unconstitutional. The First Amendment prevents Congress from using funding conditions to coerce local libraries to adopt a one-size-fits-all scheme far more restrictive than the one most libraries, on their own, would decide to implement.

STATEMENT

A. Statutory Framework and Legislative History

1. CIPA imposes a new set of conditions on two federal funding programs for Internet connections in public libraries. One, the FCC-administered "universal service" or "E-rate" program, provides libraries and schools with discounted rates for access to telecommunications services, including high-speed Internet access and internal network connections. The overarching goal of the universal service program is to spread the benefits

of advanced telecommunications services to people with low incomes and those in remote areas. *See* 47 U.S.C. § 254(b)(2), (3). The FCC allocates funding to libraries using objective criteria related to the populations they serve. *See* 47 C.F.R. § 54.505(b). Prior to CIPA's enactment, the E-rate discount scheme imposed no conditions on the content of Internet access offered by recipients.

CIPA also modifies the Library Services and Technology Act of 1996, 20 U.S.C. §§ 9121 *et seq.* (LSTA), adding a comparable condition to the LSTA's Grants to States program, which funds state library administrative agencies according to a population-based formula. The state library agencies use those funds in a variety of ways, including paying the costs of local library Internet access, improving linkages among libraries, and improving information access and services, particularly in low-income, underserved, and rural communities. *Id.* § 9141(a). Before CIPA, the LSTA set no limitations on the content of Internet access funded by the Grants to States program.

2. CIPA requires a public library[1] accepting federal funds for Internet access to install and use content blocking software on "any of its computers with Internet access," "during any use of such computers." 47 U.S.C. § 254(h)(6)(B), (C) (for E-rate); 20 U.S.C. § 9134(f)(1)(A), (B) (for LSTA). Recipient libraries must certify that the blocking software "protects against access . . . to visual depictions" that are "obscene" or "child pornography." 47 U.S.C. § 254(h)(6)(C); 20 U.S.C. § 9134(f)(1)(B). In addition, CIPA requires libraries to certify that, during Internet use by minors,[2] the software also "protects against access . . . to visual depictions" that are "harmful to minors." 47 U.S.C. § 254(h)(6)(B);

[1] Plaintiffs did not challenge, and the district court did not address, CIPA's restrictions on public school Internet funding.

[2] CIPA contains no exceptions for parental permission. The additional restrictions on minors' access apply even if a minor's parents wish to allow, or even encourage, broader access.

20 U.S.C. § 9134(f)(1)(A).[3] CIPA's blocking requirements thus extend to *all* of a library's computers, including those not subsidized by federal funds. They also extend to Internet use by library staff. *See In re Federal-State Joint Board on Universal Service*, 16 F.C.C.R. 8182, ¶ 30 (2001).

CIPA contains several disabling provisions that permit libraries to disable the software "to enable access for bona fide research or other lawful purposes." 47 U.S.C. § 254(h)(6)(D); 20 U.S.C. § 9134(f)(3). The Act, however, does not *require* libraries to disable under those circumstances, nor does it define or provide any additional guidance explaining the terms "bona fide research" or "other lawful purposes."[4]

3. Despite the clear applicability of CIPA's funding conditions to adult patrons and staff, the legislative history of CIPA, like the Act's name, focused almost exclusively on the protection of minors. *See, e.g.*, S. Rep. No. 106-141, at 1 (1999); *id.* at 7. Indeed, the Senate Report dismissed the acknowledged First Amendment concerns over Internet filtering by focusing on the fact that the bill, at the time, required filtering "only while a computer is in use by a minor." *Id.*

Congress also was aware of less restrictive means for furthering the interest in protecting minors. During earlier consideration of CIPA in 1999, Congress debated an alternative scheme, the Neighborhood Children's Internet Protection Act (NCIPA), H.R. 4577, amend. no. 3635, 106th Cong.; 146 Cong. Rec. S5823-07, S5842 (June 27, 2000), which was specifically geared toward children. In its original form, NCIPA would have given

[3] CIPA incorporates the preexisting definitions of "obscene" and "child pornography" in the criminal code. 47 U.S.C. § 254(h)(7)(E), (F); 20 U.S.C. § 9134(f)(7)(A), (D). CIPA's definition of "harmful to minors" is similar to many state harmful to minors statutes. 47 U.S.C. § 254(h)(7)(G); 20 U.S.C. § 9134(f)(7)(B).

[4] CIPA irrationally contains two distinct disabling provisions, one applicable to E-rate funding and another to LSTA funds. The former applies only "during use by an adult," 47 U.S.C. § 254(h)(6)(D), while the latter covers Internet use by both minors and adults, 20 U.S.C. § 9134(f)(3). The Government has never attempted to reconcile these two provisions.

libraries two ways to qualify for library Internet subsidies: either implement a comprehensive plan to prevent children from accessing harmful material on the Internet, or purchase the filtering technology now required by CIPA. *Id.* § 602(a)(2); 146 Cong. Rec. at S5843. Libraries choosing the former method would have enjoyed full discretion to develop their own standards regarding what matter is inappropriate for minors; federal agencies would have had no authority to review those determinations. *Id.* § 602(a)(3).[5] Although Congress eventually passed a version of NCIPA, 47 U.S.C. § 254(l), libraries receiving E-rate discounts may not choose between CIPA and the more permissive NCIPA; they must comply with both.[6]

In rejecting less restrictive alternatives to mandatory filtering for all patrons, Congress had no evidence that blocking software works as advertised, let alone as CIPA seems to assume. In fact, the only federally sanctioned study of blocking software at the time – a report by the federal Commission on Child Online Protection – declined to endorse the mandatory use of blocking software, concluding that "no single technology or method will effectively protect children from harmful material online." COPA Commission Report, Oct. 20, 2000, at 9; *see also, e.g., id.* at 19-20,

[5] The bill's sponsor, Senator Santorum, explained that NCIPA would have avoided having "Washington come down and hammer [local governments] and say here is what you have to do," while permitting "[l]ocal parents and teachers and community [to] bring the community together and do that hard work of democracy, which is to work together to come up with the solution to the problem." 146 Cong. Rec. at S5843 (statement of Sen. Santorum).

[6] Under NCIPA as enacted, libraries covered by CIPA must also adopt and implement an Internet safety policy that addresses, among other things, "access by minors to inappropriate matter on the Internet"; "the safety and security of minors" when using email, chat rooms, etc.; and "measures designed to restrict minors' access to materials harmful to minors." 47 U.S.C. § 254(l)(1). Pursuant to NCIPA, "[a] determination regarding what matter is inappropriate for minors shall be made by the . . . library . . . . No agency or instrumentality of the United States government may – (A) establish criteria for making such determination; (B) review the determination made by the certifying [entity] . . .; or (C) consider the criteria employed by the certifying [entity] . . . ." *Id.* § 254(l)(2).

21, 22 (concluding that blocking technology raises "First Amendment concerns because of its potential to be over-inclusive in blocking content," and that "[c]oncerns are increased because the extent of blocking is often unclear and not disclosed"). Moreover, Congress in CIPA mandated that the National Telecommunications and Information Administration *begin* evaluating blocking software eighteen months *after* the enactment of CIPA. *See* CIPA, Pub. L. No. 106-554, Div. B, Tit. XVII, 114 Stat. 2763A-336, § 1703.

B. The District Court's Factual Findings

Two sets of plaintiffs brought facial challenges to CIPA in the U.S. District Court for the Eastern District of Pennsylvania. A three-judge district court consolidated the cases and held a two-week bench trial. After hearing from twenty witnesses and considering voluminous exhibits and trial stipulations, the court ruled on May 31, 2002 that CIPA is facially unconstitutional. In its nearly 200-page decision, the court made extensive findings of fact that, although not challenged by the Government, are largely ignored in its opening brief.

1. *The role of the public library.* The district court found that the mission of public libraries is "to provide patrons with a wide range of information and ideas." J.S. App. 32a; *id.* 33a. To advance this broad mission, libraries serve their patrons' informational needs for "recreational, professional, and other purposes." *Id.* 33a. Public libraries adhere to principles of intellectual freedom and broad, unfettered access to information. In that regard, "public libraries across the country have endorsed the American Library Association's ('ALA') 'Library Bill of Rights' and/or 'Freedom to Read Statement,' including every library testifying on behalf of the defendants in this case." *Id.* 32a. Those policy statements reflect the traditional views of the library profession, including the notion that "[i]t is the responsibility of . . . librarians . . . to contest encroachments upon th[e] freedom [to read] by individuals or groups seeking to impose their own standards or tastes upon the community at large." *Id.* 33a.

When selecting print, audio, video, and other materials for their physical collections, libraries are generally guided by "the needs and interests of their patrons," and by collection development policies created with input from the library's community. *Id.* 35a. Physical collection development is essentially a local task, performed by trained library professionals with an understanding both of librarianship principles and of the community. In serving the informational needs of the local public, libraries "do not generally delegate their selection decisions to parties outside of the public library or its governing body." *Id.*[7]

Although public libraries cannot and do not carry every available item in their physical collections, they will try, consistent with their broad informational mission, to acquire for patrons materials located elsewhere "through the use of bibliographic access tools and interlibrary loan programs." *Id.* 34a. Indeed, "[p]ublic libraries typically will assist patrons in obtaining access to *all materials except those that are illegal, even if they do not collect those materials in their physical collection*." *Id.* (emphasis added).[8]

2. *The Internet in the public library.* The district court also made extensive factual findings about the provision of Internet access in public libraries. Because of its unique and boundless diversity, the Internet perfectly complements the library's core mission, and "vastly expands the amount of information available

[7] Even within the "limited exception" of "the use of third-party vendors or approval plans to acquire print and video resources," the "vendors provide materials based on the library's description of its collection development criteria." J.S. App. 35a. And "[e]ven in this arrangement, . . . the librarians still retain ultimate control over their collection development and review all of the materials that enter their library's collection." *Id.*

[8] Although the Government repeatedly cites to its library experts' reports to support its view of the mission of public libraries, U.S. Br. at 17, 18, 19, 23, those witnesses readily conceded at trial that *libraries should facilitate access to all lawful speech. See* J.A. 290 (testimony of Donald Davis) (agreeing that "the library has a professional duty to provide access to materials that are not illegal"); J.A. 266 (testimony of Blaise Cronin) (Internet filtering in libraries should not "be employed to block access by adults to web sites that are perfectly legal for them to view").

to patrons of public libraries." *Id.* 36a. As of the year 2000, about 95% of libraries in the United States provided Internet access to the public. *Id.* "Of the 143 million Americans using the Internet, approximately 10%, or 14.3 million people, access the Internet at a public library." *Id.* Public funding, including E-rate discounts and LSTA grants, contributes to the broad availability of Internet access in public libraries, *id.*, and is crucial to libraries serving low-income areas. "Approximately 70% of libraries serving communities with poverty levels in excess of 40% receive E-rate discounts." *Id.* 37a.

Libraries provide Internet access to many Americans without alternate means of access. *Id.* 36a. Library Internet use is especially high, for example, among low-income families. *Id.*[9] "By providing Internet access to millions of Americans to whom such access would otherwise be unavailable, public libraries play a critical role in bridging the digital divide separating those with access to new information technologies from those that lack access." *Id.* 130a.

Prior to CIPA's enactment, only 7% of libraries nationwide mandated the use of blocking software for all patrons. *Id.* 45a (citing Library Research Center, Univ. of Ill. Grad. Sch. of Lib. & Info. Sci., *Survey of Internet Access Management in Public Libraries* (June 2000)). The Government proffered several library witnesses at trial in an attempt to defend the reasonableness of mandatory filtering. They supplied anecdotal evidence of patron problems purportedly linked to unfiltered Internet use, but "none . . . presented any systematic records or quantitative comparison of the amount of criminal or otherwise inappropriate behavior

[9] "About 20.3% of Internet users with household family income of less than $15,000 per year use public libraries for Internet access." J.S. App. 36a-37a. Internet use in public libraries also varies by race and ethnicity, with use by Blacks and Hispanics exceeding that of Asian Americans and Whites. *See* PX 56, National Telecommunications and Information Administration, *A Nation Online: How Americans Are Expanding Their Use of the Internet*, at 40 (Feb. 2002). Racial and ethnic minorities, low-income persons, the less-educated, single people, and children of single-parent households are less likely to have home Internet access. *See id.* at 40-41.

that occurred in their libraries before they began using Internet filtering software compared to the amount that happened after they installed the software." *Id.* 41a; *see also id.* 146a. This is important because, as the district court recognized, "public libraries are public places, [and] incidents involving inappropriate behavior in libraries (sexual and otherwise) existed long before libraries provided access to the Internet." *Id.* 41a; *also id.* 146a.

Moreover, not one of the Government's library witnesses tried to use all, or even most, of the less restrictive alternatives for managing Internet use. In particular, none of the libraries experimented with optional, rather than mandatory, filtering. In addition, because "[n]one of these libraries makes differential unblocking decisions based on the patrons' age, . . . [u]nblocking decisions even for adults are usually based on suitability of the Web site for minors." *Id.* 47a. Finally, although the Government's witnesses claimed they stood ready to "unblock" erroneously blocked Web sites, the district court found that case-by-case disabling does not undo the harms caused by mandatory filtering, because "many patrons are reluctant or unwilling to ask librarians to unblock Web pages or sites that contain only materials that might be deemed personal or embarrassing, even if they are not sexually explicit or pornographic." *Id.* 47a; *see also id.* 13a, 46a-48a, 172a-74a.[10]

As several of plaintiffs' librarian witnesses confirmed, the 93% of libraries that do not require all patrons to use blocking software have adopted various policies to ensure that patron Internet access is open, safe, positive, and effective. Instead of mandatory filtering, those libraries have taken a number of less

[10] Even where disabling requests can be made anonymously, patrons typically are disinclined to ask that sites be unblocked. J.S. App. 47a-48a. In addition, because of the way blocking software works, a patron cannot view a blocked site to determine whether to request unblocking. *Id.* 52a-53a. Finally, the unblocking process takes an inordinate amount of time. "Indeed, a patron's time spent requesting access to an erroneously blocked Web site and checking to determine whether access was eventually granted is likely to exceed the amount of time the patron would have actually spent viewing the site, had the site not been erroneously blocked." *Id.* 174a.

restrictive steps to regulate patron Internet use, including: optional filtering, *id.* 45a, 165a; filtering only of minors' access, with or without the possibility of parental override, *id.* 162a-63a; using privacy screens or recessed monitors to prevent passers-by from inadvertent viewing of unwanted material, *id.* 37a, 43a-45a, 166a; segregating Internet terminals, *id.* 165a; providing Internet training and education to patrons, *id.* 41a; and the enforcement of Internet use policies prohibiting access to illegal materials, *id.* 158a-60a. *See also* J.A. 381-83, 414-15 (PX 29) (ALA publication describing alternatives to filtering).

3. *Ineffectiveness of filtering software.* The district court heard testimony from several expert witnesses, including the Government's own experts, who examined the effectiveness of filtering software. Based on this evidence, the district court found that filtering software is an inherently crude tool that both "underblocks," in that it fails to block a substantial number of targeted sites, and "overblocks," in that it blocks an enormous amount of constitutionally protected speech on the Internet, including much that is not sexually explicit at all. *See* J.S. App. 6a-7a, 58a, 68a, 79a, 90a-94a. The problems with overblocking are particularly significant. Because filters block according to content categories that are far broader than those proscribed by CIPA, the software necessarily would block a substantial amount of protected speech even if it worked with perfect accuracy. *Id.* 11a, 51a. Moreover, as the district court found, filters routinely block an enormous amount of content that does not meet even their own category definitions. *Id.* 72a-73a, 91a, 93a-94a.

a. *Filters are not tailored to CIPA or to the mission of a public library.* The Government does not dispute that blocking software is the only real option available to libraries seeking to comply with CIPA. Blocking software prevents a user from viewing any Web page on a preset block list. *Id.* 48a-49a, 52a. The block lists group Web pages into a wide range of content categories such as "Nudity," "Alcohol," "Sex," "Swimsuits," "Tasteless/Gross," and "Travel." *Id.* 49a-51a. Customers can choose particular content categories to enable. *Id.* 49a.

Filters are ill-suited to the task of blocking library patrons from viewing only the images prohibited by CIPA. Although CIPA requires libraries to protect against access only to "visual depictions," filters block both images and text. *See id.* 56a. There is no judicial involvement in the blocking software companies' decisions about which Web sites to block, and these companies make no attempt to conform their decisions to the legal definitions of speech that is obscene, child pornography, or harmful to minors, or to take into account local community standards in making these determinations. *Id.* 51a, 60a-61a. Therefore, to comply with CIPA, a library must select a filtering software category that blocks a broad range of constitutionally protected text and images that are not prohibited by the Act. *Id.* 49a-51a. Further, because the software does not differentiate adult use from use by minors, it inevitably blocks an additional large quantity of speech that is fully protected as to adults. *Id.* 6a.

A library that installs blocking software, moreover, has no way of knowing which sites will be blocked. The filter companies consider their control lists to be proprietary, and customers are not allowed access to them. *Id.* 52a-53a. As a result, the only way for a library administrator to know whether a particular site will be blocked is through individual trial and error. *Id.* 53a. Having discovered a wrongly blocked page, it is possible for a filter customer to remove the page from the control list, but the override must be done manually. *Id.* 52a. Because of the secrecy of the block lists and the vast size of the Internet, it is inevitable that the blocking software will operate in practice largely free of any application of the professional judgment of librarians to particular sites.

b. *Blocking software's inherent problems of overblocking and underblocking.* As the district court found, blocking software is plagued by underblocking and overblocking errors that result from the software companies' inability to keep up with the size and rapid growth of the Web. It is estimated that the Web has over 2 billion publicly accessible pages, and is growing at a rate

of about 1.5 million new pages per day. *Id.* 30a.[11] These numbers, moreover, represent only the pages that theoretically can be reached by standard search engines; there are an estimated two to ten times as many Web pages that cannot be located by such tools (but can be found by typing in the pages' specific Web addresses). *Id.* 31a. Faced with such an enormous universe of material, filtering companies locate and categorize only a fraction of the Web. *Id.* 55a-56a, 91a. As a result, blocking software will fail to block many Web pages that might fall within CIPA's definitions. *Id.* 56a, 58a, 90a-91a.

In addition to underblocking, filtering companies employ a number of techniques that result in overblocking. These companies use automated classification tools that contribute to erroneous overblocks of Web sites. *See id.* 59a-60a. And although the major filtering companies purport to have their employees review most of the sites "harvested" from the Web, "[g]iven the speed at which human reviewers must work to keep up with even a fraction of the approximately 1.5 million pages added to the publicly indexable Web each day, human error is inevitable." *Id.* Once a site is reviewed, moreover, it is rarely re-reviewed in the future, because filtering companies re-review categorization decisions only upon individual request. *Id.* 53a. "This necessarily results in both over- and underblocking, because . . . the content of Web pages and Web sites changes relatively rapidly." *Id.* 65a.

Because it is impossible for their staff to review every single harvested Web *page*, blocking software companies "widely engage in the practice of categorizing entire Web sites at the 'root URL,' rather than engaging in a more fine-grained analysis of the individual pages within a Web site." *Id.* 61a.[12] In other words,

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[11] Many of blocking software's inherent flaws stem from the architectural peculiarities of the Internet., which the district court described in detail in its opinion. *See* J.S. App. 25a-28a.

[12] The URL, or Uniform Resource Locator, is "an address that points to some resource located on a Web server that is accessible over the Internet," and may be a numeric Internet Protocol (IP) address or an

if a site with hundreds of pages includes even a few pages that ostensibly meet the filtering company's content categories, the company will block the entire site. *Id.* 92a. Similarly, filters will block an IP address entirely, even if the Web server with which that address is associated hosts multiple (and in some cases, thousands) of distinct Web sites. *Id.* 62a. Further, because of particular architectural properties of the Web, filters block entire categories of Web sites containing valuable information – such as sites that allow the user to visit other Web sites anonymously, sites that provide language translation services, and "cache" sites of archived Web pages. *Id.* 62a-64a. These sites provide important services to users, but they are a problem for filter companies because they allow users to access content without the use of URLs that may be on the blocking lists.

The district court found that the Government's *own* expert study of the use of blocking software in three libraries showed an overblocking rate of 6% to 15% – *i.e.*, 6% to 15% of the Web sites that patrons tried to access but were blocked did not meet the filtering companies' own category definitions. *See id.* 72a-73a, 78a-79a.[13] Based on the findings of both the Government's and the plaintiffs' experts, the district court concluded:

> At least tens of thousands of pages of the indexable Web are overblocked by each of the filtering programs evaluated by experts in this case, even when considered against the filtering companies' own category definitions. Many erroneously blocked pages contain content that is completely innocuous for both adults and minors, and that no rational person could conclude matches the filtering companies' category definitions, such as "pornography" or "sex."
>
> The number of overblocked sites is of course much higher

alphanumeric address. J.S. App. 26a-27a.

[13] Because of the numerous methodological flaws associated with the Government's expert study, the district court concluded that its finding of 6% - 15% overblocking rates "cannot be considered as anything more than minimum estimates of the rates of overblocking that happens in all filtering programs." J.S. App. 79a.

> with respect to the definitions of obscenity and child pornography that CIPA employs for adults, since the filtering products' category definitions, such as "sex" and "nudity," encompass vast amounts of Web pages that are neither child pornography nor obscene.

Id. 93a.[14]

Especially pernicious is blocking software's disproportionate effect on sites dealing with sensitive sexual issues, such as sexual health and gay and lesbian sites. The district court found that "filtering software blocks large quantities of . . . information about health and sexuality that adults and teenagers seek on the Web." *Id.* 3a-4a. Indeed, a recent study cited in the Government's brief found that filters disproportionately overblocked sites dealing with sexual health and gay health issues. According to that study, "[a]t the least restrictive setting, where products were supposed to block pornography only, about 10% of nonpornographic health information sites returned from searches using the terms *safe sex*, *condom*, and *gay* were blocked, while for most other searches less than 1% of health sites were blocked." Carolyn R. Richardson et al., *Does Pornography-Blocking Software Block Access to Health*

[14] The thousands of Web pages that the district court found "no rational person could conclude match[] the filtering companies' category definitions," J.S. App. 93a, are too numerous to list here, but include, for example: "Orphanage Emmanuel, a Christian orphanage in Honduras that houses 225 children," blocked by Cyber Patrol in the "Adult/Sexually Explicit" category; "Vision Art Online, which sells wooden wall hangings for the home that contain prayers, passages from the Bible, and images of the Star of David," blocked in Websense's "Sex" category; "the home page of the Lesbian and Gay Havurah of the Long Beach, California Jewish Community Center," blocked by N2H2 as "Adults Only, Pornography," and by Smartfilter and Websense as "Sex"; "the Web site for Bob Coughlin, a town selectman in Dedham, Massachusetts," blocked under N2H2's "Nudity" category; "the Web site for Wisconsin Right to Life," blocked by N2H2 as "Nudity"; "the Western Amputee Support Alliance Home Page," blocked by N2H2 as "Pornography"; and "a site dealing with halitosis," blocked by N2H2 as "Adults, Pornography," by Smartfilter as "Sex," by Cyber Patrol as "Adult/Sexually Explicit," and by Websense as "Adult Content." *Id.* 86a-89a.

Information on the Internet?, 288 JAMA 2887, 2891 (2002).[15]

The district court also found significant evidence of underblocking. J.S. App. 3a, 7a, 11a, 56a, 67a. That blocking software regularly fails to catch all sexually explicit Internet material was confirmed by the Government's experts, *e.g.*, *id.* 74a-75a, and library witnesses, who testified to incidents of underblocking even after installing blocking products on their computers, *id.* 77a.

The problems with filters are not simply short-term glitches that will be solved by technological advances, as the Government suggests. *See* U.S. Br. at 5. As plaintiffs' expert Dr. Geoffrey Nunberg explained, the flaws identified with blocking software inhere in the nature of the Web and the necessary tradeoff between the goals of blocking as much content as possible (to prevent underblocking) and correctly categorizing the content of individual Web pages (to prevent overblocking). Relying on Dr. Nunberg's testimony, the district court concluded:

> [I]t is currently impossible, given the Internet's size, rate of growth, rate of change, and architecture, and given the state of the art of automated classification systems, to develop a filter that neither underblocks nor overblocks a substantial amount of speech. The more effective a filter is at blocking Web sites in a given category, the more the filter will necessarily overblock. Any filter that is reasonably effective in preventing users from accessing sexually explicit content on the Web will necessarily block substantial amounts of non-sexually explicit speech.

J.S. App. 68a.

SUMMARY OF ARGUMENT

I. The district court correctly held that CIPA is an unconstitutional exercise of Congress's spending power because it requires public libraries, as a condition of receiving federal

[15] Studies chronicling filters' shortcomings have noted the tendency of blocking software to block sexual health and gay and lesbian sites. *See* PX 82 App. Vol. 1, Tab 3, at 36 (Expert Report of Christopher Hunter).

Internet funding, to engage in conduct that would violate the First Amendment. Congress demanded in CIPA that libraries providing Internet access install filtering software that the district court found would block far more than the unlawful, unprotected expression specified in the statute – including a large number of Web sites that are not sexually explicit in any way. A library complying with that mandate would be imposing a content-based restriction on a medium of communication that is otherwise open for use by patrons to access information on an unlimited number of topics. Such selective censorship of protected speech by a state actor runs afoul of the First Amendment.

A. Knowing it cannot justify CIPA if the speech restrictions it mandates trigger strict scrutiny, the Government devotes the bulk of its argument to attempting to avoid such exacting review. But that effort is unavailing. Internet access in a public library constitutes the paradigm of a "designated public forum" from which the state may not exclude one disfavored category of speech based on its content. Library patrons who use the Internet have access to a vast panorama of information, and decide for themselves where to go in cyberspace and why. Given that reality, a library's use of software designed to exclude one particular category of protected speech is constitutionally suspect.

That the Internet terminals at issue are located in a public library in no way justifies a different constitutional analysis. A library, after all, is an institution that exists to enable private citizens to access whatever information they may seek. The library's mission is fundamentally inconsistent with a decision to prevent patron access to otherwise available expression. Nor is there any valid analogy between filtering Internet access and the inevitable content-based choices a library makes when it acquires materials for its physical collection. With the provision of Internet access, the library opens up a portal to a huge amount of communication, much of which would never be purchased for inclusion in a physical collection. It cannot then sever access to a limited class of that universe – relying entirely on the secret decisionmaking of third-parties – and claim that this is akin to

classic physical collection development.

B. The district court correctly held that installation of blocking software cannot be justified under the applicable strict scrutiny. Internet filters inevitably block access to many thousands of Web sites that do not meet the software companies' own definitions, let alone those set forth in CIPA. To the extent that the Government's purpose in the Act is to mitigate behavior problems that arise when patrons access sexually explicit sites, that purpose is insufficient in principle. The government may not censor speech in order to affect conduct. A second asserted interest – in preventing patrons from accessing illegal speech – may be viewed as compelling, but it cannot justify blocking a large amount of speech that is legal and constitutionally protected. The state may not censor protected speech in order to suppress unprotected speech. Finally, as to the Government's claimed interest in protecting other library users from inadvertent exposure to sexually explicit images, the district court found as a fact that there are other less restrictive means of serving this interest – means that have been tried and tested by the 93% of libraries that were not requiring use of blocking software for all patrons prior to CIPA's enactment.

II. Even if the Government were correct that individual public libraries have the constitutional authority to make "editorial judgments" about the Internet content made available to patrons, that still would not justify CIPA. In essence, the Act is an effort to coerce libraries to make the particular judgment on that issue that Congress favors, even if libraries, on their own, would adopt a less restrictive approach. Through CIPA, Congress effectively cuts off patrons from a category of speech, defined by its content, without any knowledge of the particular local circumstances that might or might not lead a library to make that choice. Such a law unconstitutionally restricts the freedom of speech protected by the First Amendment, regardless of whether the direct recipients of the federal funds – libraries – themselves have First Amendment rights. In any event, if the Court reaches the question, it should recognize that the First Amendment does

not give the federal government free rein to censor the content of expression favored by local municipal entities.

ARGUMENT

Although the Government asks this Court to withhold any form of heightened constitutional scrutiny in this case, that request cannot be taken seriously. In CIPA, Congress sought to prevent private citizens from accessing particular expressive works of other private citizens, because Congress believed that the communicative impact of that speech would negatively affect those seeking it out on the Internet and others passing nearby. Such a law raises core First Amendment concerns, particularly when it leads to the suppression of vast amounts of fully protected expression. The First Amendment prohibits public libraries from restricting speech on such a basis, and prevents Congress from using its spending power to induce them to do so.

I. CIPA INDUCES UNCONSTITUTIONAL SPEECH RESTRICTIONS ON INTERNET ACCESS IN PUBLIC LIBRARIES.

CIPA cannot be sustained as a valid exercise of Congress's spending power because it induces libraries that receive Internet funding to violate the First Amendment rights of their patrons. As the Government concedes, U.S. Br. at 16, when Congress distributes funds to state and local governments, it cannot do so in a way that "induces [those entities] to engage in activities that would themselves be unconstitutional." *South Dakota v. Dole*, 483 U.S. 203, 210 (1987). CIPA requires libraries that accept funds to impose a content-based restriction on a public forum – Internet access in public libraries – that is otherwise open to communication, on a virtually infinite number of topics, between library patrons and any persons who have chosen to create Web sites. A library's decision to impose such a content-based restriction triggers strict scrutiny – and thus could be justified only by proof that the restriction is narrowly tailored to serve a compelling interest in the least restrictive manner possible.

A funding condition demanding such presumptively

unconstitutional conduct would be permissible under *Dole* only if the Government could demonstrate that the applicable strict scrutiny is satisfied in most, if not all, instances.[16] But the Government knows that it cannot make such a showing. Its purported justifications, even taken at face value, depend on local conditions and circumstances – yet the facts show that 93% of the nation's libraries, when left free to make the decision about whether to install mandatory blocking software, have chosen not to do so and have found less restrictive measures to be equally effective in addressing the governmental interests at stake.

Thus, the Government, in attempting to show that CIPA is consistent with *Dole*, relies almost exclusively on the argument that mandatory filtering of the Internet in libraries does not warrant any heightened scrutiny under the First Amendment. It draws an analogy to librarians' everyday judgments about the contents of their libraries' physical collections and asserts that to apply heightened scrutiny here would threaten local libraries' "responsibility for the resources that they collect and make available to their local communities." U.S. Br. at 19. That argument is ironic, because the Government is defending a federal condition designed to motivate libraries *not* to follow the professional judgment of their librarians about the best ways to manage public Internet access. *See* Point II *infra*. And it is also incorrect. Heightened scrutiny must apply where, as here,

[16] Unlike in the district court, the Government no longer claims that it can avoid CIPA's facial invalidation by showing that a single library could constitutionally comply with the funding restrictions. That change of course is understandable. The principle that a law attacked facially must be invalid in all applications does not apply to cases under the First Amendment. *See, e.g., Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002) (a law "is unconstitutional on its face if it prohibits a substantial amount of protected expression"); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). In any event, it makes no sense to read *Dole* as allowing funding conditions that trigger strict scrutiny and are usually, if not always, unconstitutional. Under that theory, a statute could validly require municipalities receiving federal funds to employ a specified percentage of African-Americans if at least one town, given its particular history and demography, could constitutionally comply with that quota.

a public institution sets up a portal allowing almost unlimited communication with the outside world, but then excludes a single area of disfavored content, using a grossly imperfect technology that is both overbroad and underinclusive.

A. Libraries Complying with CIPA's Content-Based Restrictions Would Trigger Strict Scrutiny by Excluding Protected Speech from a Forum Dedicated to Free and Open Expression.

CIPA's funding restrictions require libraries to single out for prohibition one type of speech in an otherwise unlimited forum for the exchange of ideas.[17] Indeed, through CIPA, Congress has inflicted a profound double injury upon the First Amendment. Not only does CIPA unduly restrict access to the most diverse, expansive medium ever created, it compounds the problem by regulating that medium in one of the most democratizing, speech-enhancing institutions in America – the public library. By targeting the intersection of these two First Amendment fora, CIPA ultimately weakens both, severely undermining the core constitutional values otherwise promoted by the addition of Internet access as a resource in public libraries.

1. Public libraries that provide their patrons with free access to the Internet open a portal to the nearly unlimited expression available in cyberspace. In so doing, they create a limited public forum devoted to free expression. It is well settled that the government may create a designated or limited public forum by opening up a nontraditional forum for public discourse. *See Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998); *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S.

[17] This case fundamentally involves the right of library patrons to receive information on the Internet. The First Amendment undoubtedly encompasses not only the right to speak but also the right to receive information. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 874 (1997) (invalidating statute because it "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another"); *Board of Educ. v. Pico*, 457 U.S. 853, 867-68 (1982) (plurality opinion) ("[T]he right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them.").

672, 678 (1992) ("*ISKCON*"); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44-46 (1983); *Widmar v. Vincent*, 454 U.S. 263, 267-68 (1981); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975); *City of Madison Joint School Dist. v. Wisc. Employment Relations Comm'n*, 429 U.S. 167, 174-75 (1976). The test is whether the governmental body has opened a facility to expressive activities that are "'generally available' . . . to a class of speakers." *Forbes*, 523 U.S. at 678 (quoting *Widmar*, 454 U.S. at 264). In determining whether a forum has been designated for public discourse, the Court looks to the nature of the property or medium involved, the manner in which the government has made the forum generally available for speech, and whether the property is consistent with expressive activities. *See, e.g., id.* at 677-78; *ISKCON*, 505 U.S. at 680; *Cornelius*, 473 U.S. at 802-803.

The forum at issue here – Internet access in a public library – lies at the intersection of two institutions devoted to the promotion of First Amendment values. The Internet is a unique, expansive medium for worldwide communication. "While 'surfing' the World Wide Web . . . individuals can access material about topics ranging from aardvarks to Zoroastrianism." *Ashcroft v. ACLU*, 122 S. Ct. 1700, 1703 (2002). As the Court recognized in *Reno v. ACLU*, 521 U.S. 844 (1997), expression on the Internet is "as diverse as human thought," *id.* at 870, and "is thus comparable, from the reader's viewpoint, to . . . a vast library including millions of readily available and indexed publications," *id.* at 853. The Internet presents low entry barriers, allowing almost anyone to communicate with a worldwide audience. J.S. App. 25a. Currently, at least 400 million people use the Internet worldwide, including over 143 million Americans. *Id.* Given the virtually boundless potential of expression on the Internet, "[t]his dynamic, multifaceted category of communication" is entitled to the highest level of First Amendment protection, without qualification. *Reno*, 521 U.S. at 870, 872.

Providing Internet connections in public libraries, far from

lowering First Amendment protections, only serves to heighten them. The Court's analogy between the Internet and a "vast library" in *Reno* is hardly accidental. The public library by its very nature serves as a forum for the communication and receipt of information and the free exchange of ideas. Indeed, the public library is "designed for freewheeling inquiry." *Board of Educ. v. Pico*, 457 U.S. 853, 915 (1982) (Rehnquist, J., dissenting). "As such, the library is a 'mighty resource in the free marketplace of ideas.'" J.S. App. 128a (quoting *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 582 (6th Cir. 1976)); *see also, e.g., Kreimer v. Bureau of Police for Morristown*, 958 F.2d 1242, 1255 (3d Cir. 1992) (public library is "the quintessential locus of the receipt of information"). As much as any institution, the public library has safeguarded the vital First Amendment right to receive speech and expression. In defining its purpose as information-provider, the public library historically has offered a wide and diverse range of expression to the public and has prohibited exclusion of materials based on disfavored content or viewpoints.[18] Thus, the vast majority of public libraries across the country, including those represented by the Government's library witnesses at trial, have endorsed the ALA's Library Bill of Rights and the Freedom to Read Statement, which state that library materials "should not be proscribed or removed because of partisan or doctrinal disapproval," and which affirm the public library's mission to provide materials "for the interest, information, and enlightenment of all people of the community the library serves," and to "make available the widest diversity of views and expressions, including those that are unorthodox or unpopular with the majority." J.S. App. 32a-33a.

Internet access in the public library thus readily qualifies

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[18] Indeed, a number of lower courts have concluded that public libraries are limited public fora. *See, e.g., Kreimer*, 958 F.2d at 1259; *Neinast v. Board of Trs. of Columbus Metro. Library*, 190 F. Supp. 2d 1040, 1043-44 (S.D. Ohio 2002); *Armstrong v. District of Columbia Pub. Library*, 154 F. Supp. 2d 67, 75 (D.D.C. 2001); *Sund v. City of Wichita Falls*, 121 F. Supp. 2d 530, 548 (N.D. Tex. 2000); *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, 24 F. Supp. 2d 552, 563 (E.D. Va. 1998).

as a designated public forum. In providing Internet access to its patrons, the public library greatly furthers its speech-disseminating mission. But having opened up a portal to a virtually unlimited number of speakers on a virtually unlimited number of topics, a library is not free to exclude a disfavored category of protected speech, identified based on its content, without satisfying strict scrutiny. *See Forbes*, 523 U.S. at 677 ("If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny."); *ISKCON*, 505 U.S. at 678 (regulation of a designated public forum is "subject to the same limitations as that governing a traditional public forum") (plurality opinion); *Perry*, 460 U.S. at 45-46 (once a government has opened up a forum for expressive activity, it may not exclude certain types of content without satisfying strict scrutiny).[19]

2. The Government argues that a public library is free to censor categories of protected speech when it provides Internet access, because libraries traditionally and inevitably exercise editorial discretion over print and other materials they provide to their patrons. That argument has no merit. To begin with, the Government paints an inaccurate picture of the traditional role and mission of the public library. The mission of libraries in America has not been to provide only those materials that librarians deem "worthwhile" and "appropriate" for their patrons. *See* U.S. Br. at 18-19, 22-24. Certainly, librarians make professional judgments about quality and diverse coverage in determining which books to collect. J.S. App. 34a-35a. To that end, librarians are trained to assess the merits of a particular work based on a variety of criteria, and sometimes rely on professional selection aids such as review journals and bibliographies in making their

[19] This Court's public forum cases have repeatedly stated that exclusions in a designated or limited public forum are subject to strict scrutiny. *See, e.g., Forbes*, 523 U.S. at 677. The Government confuses the public forum doctrine when it suggests that the applicable standard of review is not strict scrutiny, but one of reasonableness and viewpoint neutrality. That standard applies to a *non*public forum, not one that has been generally dedicated to speech activities. *See id.*

acquisition decisions. *Id.* 35a, 122a-123a. But librarians are equally responsive to community demand, and will collect popular materials regardless of whether they are "educational" or "worthwhile." *Id.* 33a. This tradition of allowing *patrons* to decide what to read is best illustrated by interlibrary loan, through which libraries will provide patrons with materials even if those materials are not in their own collection. *Id.* 34a.

The Government's theory that libraries will allow patrons to access only those materials they deem "worthwhile" or "appropriate" cannot be squared with this longstanding practice. Indeed, the Government's own expert witnesses conceded that libraries should provide adult patrons with *any* legal materials, even if they deemed those materials to be inappropriate. *See* J.A. 290 (testimony of Donald Davis) (agreeing that "the library has a professional duty to provide access to materials that are not illegal"); J.A. 266 (testimony of Blaise Cronin) (Internet filtering in libraries should not "be employed to block access by adults to web sites that are perfectly legal for them to view"); *id.* 267 (same). Therefore, in selecting even their physical collection, public libraries do not engage in the degree of editorial discretion that renders forum analysis inapplicable to public broadcasters or arts funding.[20]

[20] The Government's reliance on *NEA v. Finley*, 524 U.S. 569 (1998), and *Forbes* is therefore misplaced. *Finley* involved arts funding, which as the Court observed is different from other subsidies because in funding the arts, "the Government does not indiscriminately 'encourage a diversity of views from private speakers.'" 524 U.S. at 586 (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995)). In *Finley*, the Court noted that "[t]he NEA's mandate is to make esthetic judgments, and the inherently content-based 'excellence' threshold for NEA support sets it apart from the subsidy at issue in *Rosenberger* . . . and from comparably objective decisions on allocating public benefits, such as access to a school auditorium or a municipal theater." *Id.* (citing *Lambs Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 386 (1993), and *Conrad*, 420 U.S. at 555). Similarly, the Court in *Forbes* held that "[m]uch like a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, or a public school prescribing its curriculum, a broadcaster by its nature will facilitate the expression of some viewpoints instead of others." 523 U.S. at 674-75. The public library, by contrast, does not prescribe a

In any event, the analogy between library collection development decisionmaking and use of mandatory blocking software on Internet terminals is utterly inapt. At the outset, there is no reason even to consider libraries' physical collections in deciding how the First Amendment applies to the Internet in libraries. The relevant forum is Internet access in the public library - not, as the Government suggests, the public library generally.[21] Further, if physical collections are to be considered, the inherent differences between books and the Internet must be considered as well.

The first and most obvious difference is that the materials made available to patrons on the Internet - with or without the installation of blocking software - are not selected by librarians. It is spurious for the Government to suggest that any library has a "collection of material from the Internet," U.S. Br. at 22, developed pursuant to its "Internet collection decisions," *id.* at 24. By offering even filtered Internet access, libraries necessarily enable patrons to access innumerable Web sites containing material that no librarian has selected and that no librarian would select for their physical collections. J.S. App. 121a, 123a-125a. As a result, libraries that offer Internet access simply cannot be

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curriculum - as the Government seems to think - but rather attempts to provide the fullest array of materials and let its patrons decide what to read.

[21] Public forum analysis focuses on the specific property or medium to which the speaker - or, in this instance, the recipient of speech - seeks access. *See Cornelius*, 473 U.S. at 801 ("[O]ur cases have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property."); *Perry*, 460 U.S. at 44 (forum characteristics "differ depending on the character of the property at issue"). Because CIPA implicates library patrons' receipt of information over the Internet, that is the relevant forum, not the public library generally. *See Cornelius*, 473 U.S. at 801-02 (rejecting argument by United States that the relevant forum was the federal workplace generally, and that the federal charity drive was "merely an activity that takes place in the federal workplace"); *Forbes*, 523 U.S. at 675 (holding that "[a]lthough public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine," particular show was subject to forum analysis); *Widmar*, 454 U.S. at 267-68 (relevant forum was meeting facilities, not state university generally).

said to be exercising the type of editorial discretion that applies when they select materials for their physical collection.[22]

Indeed, even if application of a single *exclusion* could be analogized to decisions about *inclusion* in the physical collection, librarians have absolutely no involvement in the blocking decisions made by third-party blocking software companies.[23] Those decisions are made by non-librarians who know nothing of a library's existing physical collections, the communities served by libraries, or the criteria used by librarians in selecting physical materials. In fact, because the software companies treat their blocking lists as proprietary and refuse to provide those lists to customers, *id.* 52a-53a, libraries installing blocking software do not even know what Internet information they are withholding from the public. Blocking software thus is not like the third-party vendors that some libraries use in very limited circumstances, as the Government suggests. *See* U.S. Br. at 26-27. As the district court observed, libraries that use such vendors "still retain ultimate control over their collection development and review all of the materials that enter their library's collection." J.S. App. 35a. The same cannot be said of blocking software.[24]

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[22] To the extent classic collection development principles have any application in the Internet context, it is only through the selection of "recommended sites," which many libraries offer as a means of directing patrons to particularly useful or interesting Internet information. J.S. App. 41a-42a.

[23] Seeking to downplay the fact that CIPA demands exclusion of a single category of content, the Government points to evidence that a few libraries have also screened out other categories of protected speech deemed by filtering companies to be "violent" or "tasteless." U.S. Br. at 23. But multiplying the categories of content-based exclusion does not alter the fundamental fact that the Internet materials available in the public library are not selected individually, and are not limited to any particular content deemed appropriate for a library. As for the fact that some libraries bar use of Internet terminals for game play or "chat," *see id.*, those are not content-based exclusions at all.

[24] The Government's analogy fails for the additional reason that blocking Internet access involves an active, rather than passive exclusion of certain types of content. When a library declines to carry a book in hard copy as part of a necessarily selective acquisition process (given shelf space

It follows that the Government cannot rely on the cases it cites upholding individualized content-based judgments made by governmental entities. Those cases emphasize that the state actor in question is entitled to shape the message it sends by choosing particular speech or speakers. *See supra* note 20. Similarly, the Court's forum cases explain that a nonpublic forum is one in which the government retains discretion to review and select speakers to participate in the forum. *See Forbes*, 523 U.S. at 679 ("[T]he government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission.'" (quoting *Cornelius*, 473 U.S. at 804)); *see also Perry*, 460 U.S. at 47. Libraries do not apply such selective decisionmaking when they provide Internet access, filtered or not. The Government's definition of "editorial discretion" in these circumstances is essentially meaningless.

3. The Government argues that libraries can merely define the forum of Internet access to exclude one type of content – sexually explicit speech – without violating the Constitution. *See* U.S. Br. at 24, 26. Under the public forum doctrine, however, the question is, first, whether a governmental entity has created a designated public forum and then, if so, whether a content-based exclusion from that forum is narrowly tailored to serve a compelling state interest. In attempting to define the forum as excluding the material blocked by libraries that comply with CIPA, the Government stands public forum analysis on its head. Accepting the Government's argument would render *every* restriction on speech in a nontraditional forum permissible, once

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and resource constraints), it conveys no discernable message about the content of that book. When a Web site is blocked on the library's Internet terminals pursuant to a content-based policy, however, the library (through a software company) lets patrons know that it expressly disfavors the site's content. Instead of selection, the blocking of Internet sites mandated by CIPA is akin to a library's purchasing an encyclopedia or a magazine and tearing out or redacting some of its content. *See Mainstream Loudoun v. Board of Trustees of Loudoun County Library*, 2 F. Supp. 2d 783, 793-94 (E.D. Va. 1998).

the state describes the forum to incorporate that restriction. But the government cannot recast a content-based exclusion as a mere forum definition, "lest the First Amendment be reduced to a simple semantic exercise." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001); see also, *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 801 (1996) (Kennedy, J., concurring in the judgment) ("If Government has a freer hand to draw content-based distinctions in limiting a forum than in excluding someone from it, the First Amendment would be a dead letter in designated public fora; every exclusion could be recast as a limitation.").[25] To the contrary, once the government dedicates a forum to a general, speech-promoting use – in this case, the communication and receipt of the broadest spectrum of information – it cannot limit that use by disfavoring certain expression. *See, e.g., Forbes*, 523 U.S. at 677; *Perry*, 460 U.S. at 46; *Widmar*, 454 U.S. at 267-68; *Conrad*, 420 U.S. at 555. "[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Pico*, 457 U.S. at 866 (plurality opinion) (internal quotation marks omitted).

It is no answer to argue, as the Government does, U.S. Br. at 25-26, that the district court's ruling creates an incentive for libraries not to provide Internet access or not to allow access to anything but a pre-approved list of sites. Such an argument is always available in any public forum case. But the Court has consistently held that, although the government is under no constitutional obligation to create a new form of public forum, "as long as it does so it is bound by the same standards as apply in a traditional public forum." *Perry*, 460 U.S. at 46. By providing Internet access, public libraries create a forum open to every topic imaginable, except, if CIPA is applied, sexually explicit speech (and any other expression blocked by filters). This is therefore not a case where the government has limited its property or a

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[25] Under the Government's theory, for example, the government in *Conrad* lawfully could have denied auditorium access to any performance that was not "clean, healthful[] entertainment," as outlined in the auditorium's original dedication. 420 U.S. at 549 & n.4.

means of communication to a particular subject of expression, such as art or classical music. Instead, this case is "more akin to the Government's creation of a band shell in which all types of music might be performed except for rap music." *Denver Area*, 518 U.S. at 802 (Kennedy, J., concurring in the judgment). In such circumstances, strict scrutiny applies.

B. CIPA's Blocking Requirements Are Not a Narrowly Tailored and Least Restrictive Means of Serving a Legitimate and Compelling Governmental Interest.

In order to show that CIPA's blocking requirements satisfy strict scrutiny, the Government must show that (1) they serve a compelling interest, (2) they are narrowly tailored, and (3) no less restrictive means of serving the governmental interest exists. *United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000). The district court correctly concluded that CIPA's filtering mandate fails this test and therefore is impermissible under *Dole*.

1. *The claimed governmental interests.* The Government has suggested three justifications for a library's decision to prohibit unfiltered Internet access. The first – the claim that mandatory blocking of protected speech serves to reduce inappropriate or criminal behavior in public libraries – was correctly rejected by the district court as improper in principle. As the court held, even assuming that sexually explicit content will motivate some patrons to behave improperly, "the mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002); *see also id.* at 245 ("The prospect of crime . . . by itself does not justify laws suppressing protected speech."); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam). Rather, the remedy is to prohibit and sanction the misbehavior itself – just as libraries have done throughout their history. *See* J.S. App. 41a (noting that libraries, as public places, have always faced the problem of "inappropriate behavior . . . (sexual and otherwise)"). And even if reducing bad behavior could justify a speech restriction in principle, the Government made no showing, beyond a handful of anecdotes, that the Internet has significantly increased problem behavior

in libraries or that introduction of mandatory filtering has reduced it. *See id.*

The Government also has argued that mandatory filtering serves to prevent patrons from accessing unprotected and unlawful obscenity, child pornography and (for children) harmful-to-minors material. In addition, it has asserted that mandatory filtering addresses the problem of patrons other than the Internet user inadvertently viewing sexually explicit material. The district court accepted that preventing access to illegal speech is a compelling governmental interest. It also agreed, with more hesitancy, that protecting unwilling viewers might under some circumstances constitute a justification for censorship of the Internet in the library. The court properly recognized, however, that reliance on these interests runs afoul of the rest of the strict scrutiny test.

2. *Narrow tailoring.* The requirement of narrow tailoring, in this context, demands that a court give due weight to the problem of "overblocking." As the district court found, based on voluminous evidence, Internet filtering software is a blunt instrument that blocks far more speech than CIPA requires and far more than either of the Government's justifications would warrant. A huge amount of this "overblocked" material is constitutionally protected for everyone. An additional large portion is sexually explicit but non-obscene material that is protected at least for adults.[26] Taken together, these categories suggest that the vast majority of the material blocked by filters is constitutionally protected at least for some patrons.

CIPA's funding conditions, therefore, are not narrowly tailored in the sense of restricting only those types of speech relevant

[26] It is well settled that sexually explicit speech that does not fall within the narrow categories of unprotected expression is entitled to full First Amendment protection. *See, e.g., Free Speech Coalition*, 535 U.S. at 256 (confirming that speech that is neither obscene nor child pornography is protected by the First Amendment); *Reno*, 521 U.S. at 874-75 ("In evaluating the free speech rights of adults, we have made it perfectly clear that '[s]exual expression which is indecent but not obscene is protected by the First Amendment.'") (citation omitted).

to each of the governmental interests asserted. First, as to the interest in deterring access to illegal, unprotected speech, as the district court recognized, J.S. App. at 152a-53a, filtering software blocks *much* more speech than necessary to accomplish that goal. It would make a mockery of the requirement of narrow tailoring if the government could bar access to a great deal of protected speech in order to fence off a small amount of unprotected speech. This Court has emphasized that "[t]he Government may not suppress lawful speech as the means to suppress unlawful speech." *Free Speech Coalition*, 535 U.S. at 255; *see also, e.g., Playboy*, 529 U.S. at 817-18. "This rule reflects the judgment that '[t]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted. . . .'" J.S. App. at 153a (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)).[27]

The second potentially legitimate interest identified by the Government - protection of unwilling bystanders from inadvertent exposure to sexually explicit materials - is, as the district court noted, problematic. Under the First Amendment, the general rule is that speech cannot be censored based on content in order to protect those in the vicinity from offense. The usual solution for protecting sensibilities is "'averting our eyes.'" *Id.* 142a (quoting *Playboy*, 529 U.S. at 813); *see also, e.g., Free Speech Coalition*, 535 U.S. at 245 ("It is also well established that speech

[27] Even regarding the protection of young children from harmful to minors materials, obscenity, or child pornography - arguably the most compelling of the Government's asserted interests - the district court found that filtering software unavoidably blocks vast amounts of speech that is fully protected and appropriate for minors. The Court need not resolve the question whether such blocking of protected speech for children could ever be justified by the interest in screening out harmful and unprotected speech. Even if it could, the district court found that there are ample less restrictive alternatives for protecting children from material they might choose to access - including close adult supervision of terminals available to children, parental choice about filtering, or even a flat rule that children below a suitable age are limited to filtered access. Whether any or all of these options would pass constitutional muster, they certainly are less restrictive than CIPA's broad filtering mandate. *See, e.g., Denver Area*, 518 U.S. at 756.

may not be prohibited because it concerns subjects offending our sensibilities.").[28] And even as to inadvertent exposure of children, this Court has explained that the interest in protecting children from potentially harmful materials "does not justify an unnecessarily broad suppression of speech addressed to adults. . . . [T]he Government may not 'reduc[e] the adult population . . . to . . . only what is fit for children.'" *Reno*, 521 U.S. at 875. "Surely, this is to burn the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383 (1957); *see also Denver Area*, 518 U.S. at 759; *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 128 (1989); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.").

But even assuming that the library context justifies some limits on access to constitutionally protected but sexually explicit sites in order to protect unwilling bystanders, the evidence at trial made clear that blocking software is not narrowly tailored even to achieving that broader objective. To the contrary, a vast amount of material blocked by the filters is not sexually explicit at all. Thus, a library complying with CIPA would bar patrons from accessing thousands of sites offering fully protected content that would not offend anyone's sensibilities. Many of these blocks are completely random and utterly irrational. But perhaps even more troubling are those that are not - for example, the disproportionately large number of blocks of sexual health and gay and lesbian sites. *See* J.S. App. 3a-4a.[29]

[28] "[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather . . . the burden normally falls upon the viewer to 'avoid further bombardment of (his) sensibilities simply by averting (his) eyes.'" *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-11 (1975); *see also, e.g., Cohen v. California*, 403 U.S. 15, 21 (1971).

[29] Another example of non-random overblocking is the frequent blocking of sites that criticize filtering software. *See* Expert Report of Geoffrey Nunberg, at 75 (PX 70); 3/26/02 Tr. 237-38, 258 (testimony of Christopher Hunter).

This kind of rampant overblocking was found by the district court to be an inevitable feature of software that attempts to categorize the huge and constantly changing world of the Internet, because of the inherent trade-off between accuracy of categorization (avoiding overblocking) and comprehensiveness of coverage (avoiding underblocking). "[A]ny filter that blocks enough speech to protect against access to visual depictions that are obscene, child pornography, and harmful to minors, will necessarily overblock substantial amounts of speech that does not fall within these categories." *Id.* 151a.

Mandatory blocking thus cannot be viewed as narrowly tailored to serve the asserted interest in protecting unwilling viewers – or any other legitimate governmental interest.[30] Rather, it is a blunt instrument for use in an area that requires far more "sensitive tools." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963). As this Court has explained, "[t]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. Error in marking that line exacts an extraordinary cost." *Playboy*, 529 U.S. at 817 (internal quotation marks and citation omitted).

The Government does not directly challenge any of the district court's factual findings about filters' ineffectiveness. Instead, it seeks to minimize the problem by conjuring up additional facts. The Government's brief extrapolates from one expert's testimony and a recently published study not in the record to reach the conclusion that filtering software erroneously blocks approximately one percent of all Web sites. U.S. Br. 34-35. But neither cited source remotely supports such a conclusion,[31] and

[30] Indeed, the Government itself does not really claim otherwise. In its half-hearted, two-paragraph section arguing that strict scrutiny is satisfied, it does not even acknowledge that the speech blocked extends beyond obscenity and pornography. U.S. Br. at 39-40.

[31] The study by plaintiffs' expert Benjamin Edelman was an effort to compile a large number of overblocking examples. Although he began with 500,000 URLs gathered from the Web, and created a list of between 4,403 and 4,783 overblocks, the set of 500,000 was never intended to be representative of the Web, nor were the identified overblocks described as a comprehensive list. J.A. 297-99, 302, 353 (testimony of Benjamin Edelman).

As for the recent publication cited by the Government, *see* Carolyn R. Richardson et al., *Does Pornography-Blocking Software Block Access to Health Information on the Internet?*, 288 JAMA 2887 (2002), it was never presented to the district court and used a methodology criticized (when used by several expert witnesses) by the court as fundamentally flawed. *See* J.S. App. 69a-70a. In any event, the report largely supports concerns about content-based overblocking. The researchers found that "[a]t the least restrictive setting, where products were supposed to block pornography only, about 10% of nonpornographic health information sites returned from searches using the terms *safe sex*, *condom*, and *gay* were blocked, while for most other searches less than 1% of health sites were blocked." Richardson, 288 JAMA at 2891. Further, "with searches on *safe sex*, . . . 33% of health sites were blocked by at least 1 of the products, even on the least restrictive setting." *Id.* at 2892.

even if they did, erroneous censorship of one percent of the approximately 2 billion Web pages can hardly be characterized, to use the Government's word, as "negligible." *Id.* at 35.

The district court found it more relevant to look at the blocks actually imposed by the available software when used in a library setting, and to ascertain what percentage of those blocks were erroneous. *See* J.S. App. 70a. Using that approach, the Government's own expert found that between 6% and 15% of the blocked sites "contained no content that meets even the filtering products' own definitions of sexually explicit content, let alone the legal definitions of obscenity or child pornography." *Id.* 149a. The court explained in detail why "these percentages significantly underestimate the amount of speech that filters erroneously block, and at best provide a rough lower bound on the filters' rates of overblocking." *Id.* In other words, there can be little doubt that the censorship that would actually result from mandating use of filtering software in the library setting would go far beyond restrictions that could be called "narrowly tailored" to achieving any legitimate goal.

In a final effort to minimize this problem, the Government suggests that "[a]ny information that may be erroneously blocked can often be found on another Web site or on the library's bookshelves." U.S. Br. at 35. This assertion is not supported

by any evidence, and ignores the fact that many Web sites contain unique expression. Further, it is no answer to the wrongful censorship of such expression to say that a patron may find similar speech elsewhere. *See, e.g., Reno*, 521 U.S. at 880 ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.") (internal quotation marks and citation omitted); *Conrad*, 420 U.S. at 556.

3. *Less restrictive alternatives.* Because CIPA's ban on speech is so wide, and includes a significant amount of Internet speech that is in no way related – much less tailored – to the images CIPA seeks to prohibit, the law fails strict scrutiny even without the existence of less restrictive alternatives. But even if that were not true, "[t]he breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as [CIPA]." *Reno*, 521 U.S. at 879. Not only has the Government not met that burden, it essentially ignores the numerous alternative methods identified by appellees at trial for satisfying the government's purported interests. As the district court found, these alternatives include the *optional* use of blocking software, possibly controlled by parents of children below a certain age; mandatory use of blocking software only for younger children (either by directing children to specified computers or through age identification policies); enforcement of local Internet use policies; training in Internet usage; steering patrons to sites selected by librarians; installation of privacy screens or recessed monitors; and the segregation of unblocked computers or placement of unblocked computers in well-trafficked areas. *See* J.S. App. 41a-45a.[32]

[32] Disregarding nearly all of these alternatives, the Government argues only that a "tap on the shoulder" policy is more restrictive than mandatory blocking software, citing as an example the Greenville County, South Carolina library that chose mandatory filtering after experimenting with an Internet monitoring policy. U.S. Br. at 37-38. The district court found, however, that libraries may implement an Internet use enforcement policy in ways that are less restrictive than mandatory blocking software – for example by reviewing Internet use logs to ensure that library computers are not being used to access child pornography. J.S. App. 159a-162a. But even accepting the Government's argument that a "tap on the shoulder" policy is more restrictive than mandatory blocking software, that does not explain why all of the other available options, standing alone or in combination, are ineffective. Indeed, the Greenville County library never attempted to use a number of alternatives, including, for example, optional filtering. And although the Greenville library witnesses testified that the library's previous attempts to address problems related to patrons viewing sexually explicit Web sites had been ineffective, those problems persisted even *after* Greenville installed its blocking software. *See id.* 41a, 77a; DX 134 (Greenville incident log showing Internet-related complaints after installation of blocking software).

These less restrictive alternatives may not be perfect, but the Government failed to prove that they are sufficiently ineffective to justify Congress's decision to opt in favor of mandatory blocking software everywhere. "It is no response that [a less restrictive alternative] . . . may not go perfectly every time." *Playboy*, 529 U.S. at 824. Indeed, it is difficult to conceive of how the Government could prove the relative ineffectiveness of all other alternative methods, when 93% of public libraries manage Internet-related issues employing these methods.[33] For example, the Government has failed to address, much less prove, why the use of optional filtering, with parental permission for younger children, would not address the diverse needs of a community while protecting children from the harms potentially caused by accessing adult sites. *See Playboy*, 529 U.S. at 824 ("A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act."). Similarly, the Government says little or nothing about why privacy screens and recessed monitors are not a better alternative than imperfect filtering software to protect passersby from inadvertently viewing sexually explicit images.

Nor has the Government presented comparative evidence

[33] The district court heard testimony from several libraries that testified that they use many of the alternatives and receive few complaints. *See* J.S. App. 42a-43a, 45a, 166a.

of mandatory blocking software and the alternative methods used by the majority of libraries. Accordingly, it has failed to meet its burden of proving that CIPA is the least restrictive way to further the government's interests. *See id.* at 826 (government's criticism of alternative methods does not justify speech restriction where "[t]he record is silent as to the comparative effectiveness of the two alternatives").

The Government's argument that blocking software is the only effective means to serve a library's "interest in preventing patrons from deliberately using the library's computers to view online pornography," U.S. Br. at 38, is a red herring. Even if the government could be said to have a compelling interest in preventing *adult* patrons from intentionally viewing sexually explicit sites regardless of whether anyone else could see those sites, the district court found that blocking software in fact regularly fails to block such sites. J.S. App. 67a, 77a, 91a.[34] At best, installation of blocking software will delay a patron's effort to locate sexually explicit Web sites; there will still be a multitude of such sites accessible to determined users of Internet terminals in libraries. Given the serious questions about the general efficacy of blocking software, and the near absence of evidence questioning – let alone disproving – the sufficiency of the proposed alternatives, the Government has utterly failed to carry its burden of showing that CIPA is the only effective means for serving the government's interest (assuming that interest could ever justify such a broad suppression of speech). *Cf. Republican Party of Minnesota v. White*, 122 S. Ct. 2528, 2537 (2002) (underinclusiveness of speech restriction casts doubt on the asserted government interest being served).[35]

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[34] Even the very limited study of Government expert Christopher Lemmons concluded that four commonly used blocking products failed to block 8% of 200 "hard core pornographic" sites chosen by Lemmons, with one of the most popular products, Cyber Patrol, failing to block over 17% of those sites. *See* DX 184, at 1, 3-4 (Expert Report of eTesting Labs).

[35] Further, it is not as if Congress was unaware of less restrictive alternatives when it passed CIPA. As previously noted, while it was considering CIPA, Congress had before it other bills that would have served

4. *Discretionary disabling*. The Act's disabling provisions do not cure the overbroad reach of CIPA's restrictions; to the contrary, they *exacerbate* the statute's constitutional infirmities. As an initial matter, CIPA merely allows, but does not require, library authorities to disable Internet filtering software. *See* 47 U.S.C. § 254(h)(6)(D); 20 U.S.C. § 9134(f)(3). Nothing prevents a library authority from denying a disabling request for any reason (or no reason at all), and there are no procedures for an appeal or review of the decision.[36] Accordingly, the disabling provisions fall within the long-disfavored category of statutes that "vest[] unbridled discretion in a government official over whether to permit or deny expressive activity." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755 (1988).

Moreover, the district court found as a fact that patrons would be unlikely to request unblocking of sites on sensitive topics – including, for example, sites on health and sexuality – because of the stigma attached to making such a request. J.S. App. 47a-48a, 171a-73a. The disabling provisions thus impose a chilling effect on requesting library patrons that reinforces CIPA's constitutional failings. *See, e.g., Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 122 S. Ct. 2080, 2089 (2002) (holding that ordinance requiring speakers to surrender anonymity violates First Amendment); *Denver Area*, 518 U.S. at 754 (noting that "written notice" requirement for access to "patently offensive" cable channels will "restrict viewing by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the 'patently offensive' channel"); *Lamont v. Postmaster Gen. of the*

CIPA's purported goals without imposing its sweeping speech restrictions. *See supra* pp. 3-4 and notes 5 & 6.

[36] In addition, to the extent the disabling provisions help cure CIPA's constitutional flaws, that cure applies only to adult patrons (for libraries receiving E-rate discounts). *Compare* 20 U.S.C. § 9134(f)(3) (disabling provision applicable during any patron Internet use) *with* 47 U.S.C. § 254(h)(6)(D) (disabling provision applicable only during adult use). There is no rational explanation for the distinction between E-rate and LSTA disabling provisions, and the Government has never attempted to offer one.

United States, 381 U.S. 301, 307 (1965) (striking requirement that recipients of Communist literature notify the Post Office that they wish to receive those materials). That chilling effect is exacerbated by the fact that a patron cannot see the blocked sites, and thus (1) may not know whether they then contain the information sought and (2) may not know whether they are in fact sexually explicit.

Nor is there a practical way to process unblocking requests anonymously without substantially burdening a patron's right to receive information on the Internet. The district court found that most libraries that used blocking software did not offer a way to request unblocking anonymously, and the one that did took from 24 hours to one week to process the request. J.S. App. 46a, 174a. Notwithstanding the Government's claims to the contrary, U.S. Br. at 35-37, that delay is itself a substantial burden. *See Watchtower Bible*, 122 S. Ct. at 2090 (ordinance that effectively bans "a significant amount of spontaneous speech" violates the First Amendment). This is particularly true in the context of Internet access, which, by its very nature, often involves immediate and spontaneous "surfing" for information. *See Denver Area*, 518 U.S. at 754 (delay in cable unblocking process unduly harms viewers "who select programs day by day (or, through 'surfing,' minute by minute)").[37]

II. CIPA IMPOSES UNCONSTITUTIONAL CONDITIONS ON INTERNET FUNDING TO PUBLIC LIBRARIES.

Even accepting the Government's conception of a library's discretion to choose whether and how to filter Internet access,

[37] It is thus no answer that obtaining books through interlibrary loan may also take considerable time. *See* U.S. Br. 36-37. As discussed above, blocking software prevents *immediate* access that would otherwise be available. When that software overblocks protected speech, the problem does not disappear just because it is possible to obtain access days later. In addition, as previously explained, CIPA's disabling provisions are entirely discretionary, whereas libraries will always provide access to all lawful expression through interlibrary loan. J.S. App. 34a. Finally, unlike with a library's failure to carry a book in its physical collection, the blocking of a Web site conveys the message that the blocked expression is disfavored.

the First Amendment prohibits Congress from foisting its own choice on every local library across the country. In its opening brief, the Government warns against federal interference that "could chill libraries from exercising traditional editorial judgments." U.S. Br. at 20; *see also id.* at 17, 19, 22, 24, 31. Yet CIPA supersedes those judgments, effectively preventing public libraries from determining, on a local level, what information to provide to their communities. Prior to CIPA's enactment, 93% of public libraries across the country decided – based on their experience, professional judgment, patron demand, and knowledge of their communities – to reject mandatory filtering. Through CIPA, however, Congress has overridden those local decisions, imposing its own, one-size-fits-all solution nationwide. CIPA thus violates the First Amendment by interfering with and distorting the informational exchange between library and patron.[38] It then exacerbates that constitutional harm by including within its restrictive conditions library Internet access supported by non-federal funds.

CIPA's far-reaching mandate is not insulated from judicial review simply because the direct funding recipients, libraries, are government entities. The constitutionality of a funding condition depends on its overall impact on protected speech, not simply on the status of the direct grantee. CIPA violates the guiding principle, reflected in the Court's funding cases, that the government may not use the power of the purse to restrict or distort avenues of private expression. In any event, if the Court reaches the question, it should recognize that public libraries do possess First Amendment rights that protect against CIPA's sweeping federal command.

[38] Although finding it unnecessary to its holding, the district court observed in a lengthy footnote that the plaintiffs "have a good argument that CIPA's requirement that public libraries use filtering software distorts the usual functioning of public libraries in such a way that it constitutes an unconstitutional condition on the receipt of funds." J.S. App. 180a-188a n.36.

A. CIPA's Federal Mandate Distorts the Usual Functioning of Public Libraries.

The Government's argument that local librarians have the constitutional authority to make their own professional judgments about blocking software, even if accepted, does not begin to justify an effort by Congress to induce libraries to make its preferred choice. Patron demand, librarians' professional judgment, community preference, a library's physical configurations, and local informational needs are all rendered irrelevant under the Act. CIPA's nationwide funding mandate thus transforms and severely undermines the expressive relationship between library and patron. Through CIPA, "the Government seeks to use an existing medium of expression and to control it, . . . in ways which distort its usual functioning." *Velazquez*, 531 U.S. at 543. The First Amendment forbids such federal coercion.

The Court consistently has distinguished between funding programs in which the state itself acts as a speaker and those in which the government "'expends funds to encourage a diversity of views from private speakers.'" *Velazquez*, 531 U.S. at 542 (quoting *Rosenberger*, 515 U.S. at 834). Although, in the former situation, the state enjoys considerable leeway to tailor its message, in the latter case, the First Amendment forbids content-based limits on the funded expression. *See, e.g., Velazquez*, 531 U.S. at 542; *Rosenberger*, 515 U.S. at 833-34; *FCC v. League of Women Voters*, 468 U.S. 364, 383, 392, 395 (1984).

As much as any American institution, the public library is "designed to facilitate private speech," *Velazquez*, 531 U.S. at 542, expanding the marketplace of ideas and information available to the local community. The library serves as a collector, provider, and amplifier of private expression, and public Internet access in libraries – regardless of its form – magnifies those speech-enhancing roles. Appellants have not even attempted to characterize E-rate and LSTA funding or CIPA's restrictions as

federal government speech, because they could not.[39] Consequently, because libraries are "engaged in a vital and independent form of communicative activity," *League of Women Voters*, 468 U.S. at 378, the government may not use its funding power "in an unconventional way to suppress speech inherent in the nature of the medium." *Velazquez*, 531 U.S. at 543.[40]

CIPA violates this basic precept. Its conditions strip libraries of all local discretion and control over the provision of public Internet access, ultimately constricting the universe of information available to patrons.[41] Just as the statute in *Velazquez* constrained

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[39] The Government nonetheless places great reliance on *Rust v. Sullivan*, 500 U.S. 173 (1991), a case in which the funding program at issue "amounted to governmental speech." *Velazquez*, 531 U.S. at 541; *see also Rosenberger*, 515 U.S. at 833 (in *Rust*, federal government "did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program"); *cf. Board of Regents of the Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217 U.S. 529 U.S. 217, 235 (2000) (where, as in *Rust*, "the government speaks," rather than facilitating a broad range of private expression, the analysis is "altogether different"). Because funding to libraries does not advance federal government speech, *Rust* is wholly inapposite.

[40] The Government argues that the strictures of the Court's funding cases apply only if the recipients have a "role that pits them against the government." U.S. Br. at 43. No such limitation exists. The invalidated regulation in *League of Women Voters*, for example, was simply content-based, restricting *all* "editorializing" by recipients, regardless of the recipient's viewpoint or policy toward the government. *See* 468 U.S. at 383 ("[T]he scope of § 399's ban is defined solely on the basis of the content of the suppressed speech."); *id.* at 384 ("'[T]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibitions of public discussion of an entire topic.'" (quoting *Consolidated Edison Co. v. Public Serv. Comm'n of NY*, 447 U.S. 530, 537 (1980)).

[41] The First Amendment injury here is magnified by the crucial role libraries play in providing Internet access to underserved communities. Because the E-rate and LSTA programs are designed to narrow the "digital divide," *see supra* p. 7, CIPA distorts the function of those programs by perpetuating gaps in Internet access among various groups. Under CIPA, those who rely on public libraries for Internet service will have substantially more restricted access to information than will people who have Internet access at home.

federally funded attorneys in making choices central to the performance of their professional duties, 531 U.S. at 542-44, and the statute in *League of Women Voters* limited expressive choices of public broadcasting stations, 468 U.S. at 383, CIPA unduly restricts librarians in exercising their professional judgments about how and to what extent information and ideas will be made available to the public. In *Velazquez*, the Court facially invalidated a funding condition that required recipients to make one particular professional choice, the decision not to challenge existing welfare law. Similarly, CIPA unlawfully requires E-rate and LSTA recipients to make one particular professional choice: the decision to mandate blocking software for all patrons. "Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us." *Playboy*, 529 U.S. at 818; *cf. New York Times v. Sullivan*, 376 U.S. 254, 269-71 (1964) ("The First Amendment . . . presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than *through any kind of authoritative selection*. To many this is, and always will be, folly; but we have staked upon it our all.") (internal quotation marks omitted) (emphasis added).

The Government suggests that CIPA does not impermissibly "distort[] the usual functioning" of public libraries because "[p]roviding patrons with illegal or harmful pornography is not 'inherent' in the role of public libraries." U.S. Br. at 43-44. This reasoning is misguided in two fundamental respects. First, the Government again ignores the district court's extensive factual findings that filtering software inevitably blocks access to vast amounts of Internet expression that is neither "illegal" nor "harmful pornography." Second, even disregarding its faulty factual assumptions about blocking software, the Government misapprehends the First Amendment injury recognized in the Court's funding cases. Regardless of the constitutional status

of any given library's Internet policy,[42] CIPA distorts the ability of libraries nationwide to decide for themselves and their communities the form and nature of those policies. That 93% of public libraries have adopted Internet use policies different from the one now dictated from Washington underscores the extent of CIPA's unlawful distortion.

In addition, the unconstitutionality of CIPA's conditions is magnified exponentially by the broad reach of the Act's blocking mandate, which covers library Internet access not even subsidized by the federal funding programs. Under the statute, a public library receiving E-rate or LSTA funding must certify that blocking software operates on "*any* of its computers with Internet access" during "*any use* of such computers," 20 U.S.C. § 9134(f)(1)(A), (B) and 47 U.S.C. § 254(h)(6)(B), (C) (emphasis added). Thus, the law requires libraries to block speech even on computers and Internet connections wholly funded by non-federal money. As in *League of Women Voters*, this creates an unconstitutional funding scheme because a recipient that "receives only 1% of its overall [Internet funding] from [federal] grants is barred absolutely" from all provision of unfiltered Internet access. 468 U.S. at 400.[43]

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[42] In *League of Women Voters*, for instance, any broadcaster lawfully could have decided never to "engage in editorializing," 468 U.S. at 366. Likewise, a funded attorney in *Velazquez* constitutionally might have opted not to "challenge existing law," 531 U.S. at 538, for a particular client. The constitutional infirmity in both cases lay in the condition that funding recipients make those choices in every circumstance.

[43] Although the two federal programs restricted by CIPA are important sources of funding for many libraries across the country, the amount of funding is irrelevant to First Amendment analysis. To establish an unconstitutional condition, plaintiffs need demonstrate only that the funding condition is aimed at restricting First Amendment rights. *See, e.g., League of Women Voters*, 468 U.S. at 400; *id.* at 390 n.19 (invalidating federal funding restriction despite fact that "vast majority of financial support comes instead" from state, local, and private sources); *cf. Forsyth County v. Nationalist Movement*, 505 U.S. 123, 136 (1992) (striking down assembly and parade permit fee ordinance) ("Neither the $1,000 cap on the fee charged, nor even some lower nominal cap, could save the ordinance because in this context, the level of the fee is irrelevant. A tax based on the content of the speech

The Government suggests that a recipient library can insulate non-federal funds from CIPA's mandate simply by offering unfiltered access at "an affiliated library that does not receive federal assistance for Internet access." U.S. Br. at 42. This argument ignores the unequivocal language of the Act, which plainly requires a library to certify that it has installed filters on "*any* of its computers with Internet access." Nothing in CIPA suggests that smaller affiliates or branches of public libraries can be treated as separate entities independent of the public libraries of which they legally are a part. Moreover, even if public libraries had the legal authority, community approval, and financial ability to establish separate legal entities funded entirely with non-federal grants, that would not save the Act. Nothing prohibited the station owners in *League of Women Voters* from creating new, wholly independent stations with non-federal funds, nor were the Legal Services attorneys in *Velazquez* prevented from opening entirely separate, private legal services centers. In those cases, as here, the funding condition was unconstitutional because the actual, direct grantee – including any of its subdivisions – was "barred from using even wholly private funds to finance its" First Amendment activity. *League of Women Voters*, 468 U.S. at 400.

B. CIPA's Funding Conditions on Public Libraries Are Subject to First Amendment Challenge.

1. The Government attempts to shield CIPA entirely from the Court's speech funding cases, arguing that the First Amendment does not apply to conditional funding that flows directly to government entities like public libraries. *See* U.S. Br. at 40-42. The Court, however, has never recognized such a doctrinal limitation. Although, as discussed below, *infra* Point II.B.2, public libraries do possess First Amendment rights against federal overreaching, "whether and to what extent [libraries] have First Amendment rights" is "the wrong question" in this case. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 775-76 (1978). As the Court explained in *Bellotti*,

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does not become more constitutional because it is a small tax.").

> The Constitution often protects interests broader than those of the party seeking vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the challenged statute] abridges expression that the First Amendment was meant to protect.

Id. at 776. *Cf. City of Madison*, 429 U.S. at 175 n.7 (Court "need not decide whether a municipal corporation as an employer has First Amendment rights to hear the views of its citizens and employees" because those rights are "inextricably meshed" with speakers' rights) (internal quotation marks omitted).

The constitutionality of coercive federal funding schemes thus turns on the overall speech-disruptive impact of the challenged condition, not merely on the rights of the direct recipients. In *League of Women Voters*, for example, the Court invalidated a content-based condition on federal funding to noncommercial broadcasting stations. 468 U.S. at 402. The Court did not distinguish, for purposes of First Amendment analysis, between the privately owned grantee stations and those owned and controlled by State and local governments. *See id.* at 393-94 & n.22 (indicating that "at least two-thirds of the public television broadcasting stations in operation are licensed to (a) state public broadcasting authorities or commissions, . . . (b) state universities or educational commissions, or (c) local school boards or municipal authorities"). Rather, the Court sustained a facial challenge to the funding condition, highlighting not only the direct grantees' rights but also "the public's 'paramount right' to be fully and broadly informed." *Id.* at 399. *Cf. Pico*, 457 U.S. at 866 (plurality opinion) (Court has focused on the First Amendment's "role in affording the public access to discussion, debate, and the dissemination of information and ideas") (internal quotation marks omitted); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas . . . .").

Similarly, the funding condition in *Velazquez* was constitutionally suspect because of its adverse impact on protected expression generally, and not simply on the rights of the immediate recipients. In striking the challenged restriction, the Court considered the condition's effect both on the direct grantee attorneys and, more importantly, on the indirect beneficiaries, their clients. *See Velazquez*, 531 U.S. at 536, 546-47. As was clear in *Velazquez*, funding cases look to the ultimate harm inflicted on "an existing medium of expression," asking whether the government, wielding its financial power, seeks to control the medium "in ways which distort its usual functioning." *Id.* at 543.

Thus, even assuming that a given library's mandatory filtering policy could pass constitutional muster, and even if public libraries lacked independent First Amendment rights – propositions appellees dispute – CIPA is still invalid because it interferes with the traditional information exchange between library and patron.[44]

2. In any event, public libraries enjoy First Amendment protection from federal speech restrictions, and can therefore challenge CIPA's funding conditions on their own behalf. The constitutional text, analogous case law, and fundamental free speech and federalism principles all support the recognition of certain First Amendment rights for local governmental entities. While those rights are not necessarily coextensive with the expressive rights of private citizens, they surely guard against CIPA's federal usurpation of local decisionmaking and autonomy.

Notwithstanding their view of the local library as "a market participant," U.S. Br. at 30, appellants argue that libraries, as

[44] This is true for another reason: libraries may sue to vindicate the underlying expressive rights of their patrons. *See, e.g., Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988) (booksellers have standing to sue on behalf of their customers); *Craig v. Boren*, 429 U.S. 190, 194 (1976); *City of Madison*, 429 U.S. at 175 n.7; *Procunier v. Martinez*, 416 U.S. 396, 409 (1974). In addition, both the ALA and Multnomah cases were brought by private patron plaintiffs, as well as libraries and library associations.

"government entities[,] do not have First Amendment rights" under any circumstances. *Id.* at 40. Nothing in this Court's jurisprudence or in the lower court decisions cited by appellants, however, supports that broad assertion.[45]

[45] Contrary to the Government's suggestion, this Court has never ruled that local governments lack First Amendment rights. In *CBS, Inc. v. Democratic Nat'l Comm'n*, 412 U.S. 94 (1973), the Court addressed the question "whether a broadcast licensee's general policy of not selling advertising time to individuals or groups wishing to speak out on issues they consider important violates the Federal Communications Act of 1934 . . . or the First Amendment." *Id.* at 97. The Court answered in the negative, and never addressed the question presented here. Nor does Justice Stewart's concurrence in *CBS* speak to the issue of municipalities' First Amendment rights *vis à vis* the federal government. *See id.* at 139 & n.7 (1973) (Stewart, J., concurring). Indeed, in his discussion of state action and government speech in *CBS*, Justice Stewart emphasized that "[g]overnment is not restrained by the First Amendment from controlling *its own expression*." *Id.* (emphasis added).

Likewise, the holdings of the lower court decisions cited by defendants, *see* U.S. Br. at 40-41, in no way implicate the issue in this case. At most, each of those decisions mentions a governmental entity's First Amendment rights only in dicta, ultimately *rejecting* private parties' challenges to the respective government's ability to convey its own message. *See, e.g., Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634, 638 (11th Cir. 1990) (rejecting private cable company's First Amendment challenge to municipal ordinance authorizing city to operate competing cable system, reasoning that "government may participate in the marketplace of ideas and contribute its own views to those of other speakers") (internal quotation marks omitted); *NAACP v. Hunt*, 891 F.2d 1555, 1565-66 (11th Cir. 1990) (upholding as permissible government speech State's flying of confederate flag over capitol dome); *Student Gov't Ass'n v. Board of Trs. of the Univ. of Mass.*, 868 F.2d 473, 481-82 (1st Cir. 1989) (rejecting challenge to state university's decision to abolish legal services office that was "an administrative unit of the [u]niversity," and holding that contrary rule would "unduly restrict[] the state's ability to control its speech"); *Estiverne v. Louisiana State Bar Ass'n*, 863 F.2d 371, 379 (5th Cir. 1989) (denying attorney's First Amendment challenge to state bar journal's refusal to publish attorney's responsive speech, and explaining that "the First Amendment does not preclude the government from exercising editorial control over its own medium of expression") (internal quotation marks omitted); *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1038 (5th Cir. 1982) (rejecting claim by private listeners to compel government-owned television stations to air controversial program,

Although this Court has not yet addressed the First Amendment rights of local governments, it is clear that other guarantees in the Bill of Rights (in addition to the Tenth Amendment) protect municipalities from the type of federal government intrusion worked by CIPA. For example, while the Takings Clause of the Fifth Amendment refers only to "private property," local governments can invoke that Amendment against action by the United States. *See United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984). The First Amendment, which simply sets forth limits on congressional power to abridge "the freedom of speech," U.S. Const. amend. I, should apply to municipal governments with even greater force. Indeed, according some First Amendment rights to municipalities is consistent with one of the original purposes of the Bill of Rights: to protect state and local governments against federal abuses of power. *See, e.g.*, Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 4-5, 7, 21-24 (1998).[46]

CIPA exemplifies those abuses. The Act conscripts public libraries into Congress's filtering mission, without taking into account the views or preferences of local communities. It overrides librarians' professional judgments and narrows the universe of available information, particularly in low-income communities. The First Amendment cannot permit that result.

Under the Government's theory that municipalities have absolutely no First Amendment rights, Congress could, for example, condition library funding on the selection of particular books and the exclusion of others. In addition, Congress could require, as a condition on federal grants to help municipalities

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and noting that "'[g]overnment is not restrained by the First Amendment from controlling its own expression'" (quoting *CBS*, 412 U.S. at 139 n.7 (Stewart, J., concurring)).

[46] Giving local governments certain First Amendment protections also comports with this Court's treatment of municipalities as persons in other contexts. *See, e.g., Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690 (1978) (municipalities are "persons" under 42 U.S.C. § 1983); *Moor v. Alameda County*, 411 U.S. 693, 717-21 (1973) (municipalities are "citizens" for purposes of diversity jurisdiction).

combat terrorism, that local governments refrain from passing resolutions about war in the Persian Gulf. Indeed, the logical implications of the Government's position would permit the federal government to impose those restrictions *directly*, without relying on any funding authority. This clearly would threaten core First Amendment values. *See, e.g., Creek v. Village of Westhaven*, 80 F.3d 186, 193 (7th Cir. 1996) ("There is at least an argument that the marketplace of ideas would be unduly curtailed if municipalities could not freely express themselves on matters of public concern.").[47]

Ultimately, the Government's theory asks the Court to disregard the distinction between federal and local government. Although the Constitution permits the government to control its own expression or that of its agencies and subdivisions, *see Board of Regents of the Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217 U.S. 529 U.S. 217, 235 (2000); *Velazquez*, 531 U.S. at 541; *Rosenberger*, 515 U.S. at 833, municipalities are not simply arms of the federal government whose speech can be readily manipulated from Washington. *See Denver Area*, 518 U.S. at 773 ("The Federal Government has no more entitlement to restrict the power of a local authority to disseminate materials on channels of its own creation, than it has to restrict the power of cable operators to do so on channels they own.") (Stevens, J., concurring); *Creek*, 80 F.3d at 193; *Township of River Vale v. Town of Orangetown*, 403 F.2d 684, 686 (2d Cir. 1968); *cf. Printz v. United States*, 521 U.S. 898, 920-21 (1997) ("As Madison expressed it: '[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.'") (quoting

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[47] Several lower courts have recognized that local governments enjoy First Amendment protections. *See County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1387, 1390 (E.D.N.Y. 1989) ("A municipal corporation, like any corporation, is protected under the First Amendment in the same manner as an individual."); *Nadel v. Regents of the Univ. of Cal.*, 34 Cal. Rptr. 2d. 188, 194 (Cal. App. 1994) (holding First Amendment applicable in libel action against public university).

The Federalist No. 39, at 245).

To be sure, the First Amendment rights of public libraries are not coextensive with those of private speakers or listeners. Indeed, as a state actor, the library itself is still constrained by the First Amendment rights of patrons. *See supra* Point I. And Congress may lawfully ask states and localities administering a federally funded program to express views consistent with the message of that program. The Government seeks to fit CIPA within the latter doctrine. U.S. Br. at 44. But that suggestion ignores the difference between government speech and government support of opportunities for private speech. When serving as a "megaphone amplifying voices that might not otherwise be audible," *Creek*, 80 F.3d at 193; *see also, e.g.*, Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications By Organizations, Communities, and the State*, 79 Cal. L. Rev. 1229, 1261-64 (1991), or a local provider of others' expression, *cf. Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994), the public library should be able to invoke the First Amendment's protections to thwart restrictive federal regulation. It is not necessary to define the precise contours of libraries' constitutional rights, *see Bellotti*, 435 U.S. at 777, to recognize that the First Amendment shields them from CIPA's sweeping mandate.

CONCLUSION

For the foregoing reasons, the judgment of the district court holding CIPA unconstitutional should be affirmed.

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No. 02-361

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

AMERICAN LIBRARY ASSOCIATION, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

I. CIPA DOES NOT INDUCE PUBLIC LIBRARIES TO VIOLATE ANY FIRST AMENDMENT RIGHTS OF THEIR PATRONS

Appellees' principal contention is that the First Amendment bars a public library from using filtering software to ensure that the library does not make pornographic visual depictions available to its patrons through its own computers on its own premises. From this premise, appellees then argue that the filtering provisions in the Children's Internet Protection Act (CIPA) are unconstitutional on their face because they induce public libraries to commit that constitutional violation. See Multnomah County Br. 24-42; ALA Br. 17-38. Appellees' submission is profoundly wrong. The First Amendment does not bar a public library from declining to be an intermediary in the purveying of pornography to people who enter its premises. To the contrary, such a judgment concerning what material to make available to its patrons conforms to the traditional practices and role of a library. More broadly, it conforms to the traditional latitude that the Constitution affords to the government in the expenditure and the utilization of its own property and resources.

Significantly, moreover, appellees do not challenge the district court's findings that there is an enormous amount of pornography on the Internet, J.S. App. 30a-31a, that library patrons, including minors, regularly search for such material, *id.* at 2a, that pornography falls outside the collection boundaries of most public libraries, *id.* at 33a, that filtering software is a reasonably effective way to keep pornography out of the library, *id.* at 90a-91a, and that a significant number of public libraries acting without any encouragement from Congress have chosen to use filtering software to accomplish that purpose, *id.* at 3a. Instead, appellees contend (Multnomah County Br. 24-29; ALA Br. 19-28) that because filtering software blocks pornography on the basis of its content, its use by a public library is subject to strict scrutiny under the First Amendment and may be justified only if narrowly tailored to further compelling government interests. That contention lacks merit.

A. Strict Scrutiny Does Not Apply To A Public Library's Content-Based Collection Decisions

Strict scrutiny does not apply to a public library's traditional exercise of judgment in deciding what material to collect for its patrons. Application of that standard to a library's collection practices would fundamentally alter the role of public libraries in our society, and replace librarians with judges in making day-to-day decisions respecting what material to include in or exclude from a library's offerings.

District court findings, largely ignored by appellees, demonstrate why that is so. Of crucial importance, the court found that in order to fulfill their traditional educational and informational mission, public libraries seek to collect material of "requisite and appropriate quality," J.S. App. 34a, and that, as a consequence, public libraries routinely consider the "content of the material" in deciding whether to add it to their collections. *Id.* at 35a. Accordingly, if strict scrutiny were applied to traditional collection practices, public librar-

ies could not perform their traditional role. Instead of public libraries deciding what material to include in their collections based on their assessment of its content, strict scrutiny would transfer that role to book authors, library patrons, and, ultimately, the courts. Under a strict scrutiny regime, any time a library refused to stock a book because it concluded that it did not contain content of suitable or appropriate quality, the author of the book or a library patron could challenge the decision as unconstitutional—including in a suit for damages under 42 U.S.C. 1983. A court would then be required to rule in favor of the challenge unless the public library could show that its decision was narrowly tailored to further a compelling interest.

No decision of this Court supports that notion. To the contrary, *Arkansas Educational Television Commission* v. *Forbes*, 523 U.S. 666 (1998), and *National Endowment for the Arts* v. *Finley*, 524 U.S. 569 (1998), establish that, when a government entity's mission entails the making of content-based decisions, strict scrutiny does not apply.

ALA asserts (Br. 23 & n.20) that *Forbes* and *Finley* are distinguishable because a public library will meet patron demand for lawful material through interlibrary loan. But the district court found that interlibrary loan "is expensive" and "therefore used infrequently." J.S. App. 34a. Even when cost is not an issue, the court found only that public libraries "typically will assist patrons in obtaining access" to lawful material, not that they always will. *Ibid.* And no decision of this or any other court has been located that even suggests that they have a First Amendment obligation to do so.

Moreover, the question here is whether public libraries may exercise their traditional discretion in deciding what material they will make generally available to the public in their own libraries, not the extent to which they will or must respond to particular patron requests for material that is at *another* library. For purposes of resolving that question, the

pertinent tradition is a library's approach to assembling its permanent collection, not its interlibrary loan policies. As the district court's findings make clear, with respect to its permanent collection, a library does not seek universal coverage, but material of "requisite and appropriate quality." J.S. App. 34a.

2. In the end, appellees implicitly concede that a public library's traditional collection practices are not subject to strict scrutiny. Instead, they argue that a public library's decisions concerning what material to make available to its patrons are judged by a different standard when that material is posted on the Internet. However, there is no sound reason that libraries should have less freedom to decide what material to make available on their Internet-connected computers than they have to decide what books, magazines, CD ROMS, movies, microfilm, or records they will make available. At bottom, a library's Internet-connected computers are simply "a technological extension of the book stack." S. Rep. No. 141, 106th Cong., 1st Sess. 7 (1999).

Consistent with that understanding, public libraries exercise judgment to exclude from their Internet-connected computers the same kinds of material that they categorically exclude from their physical collections, including material they view as offensive, tasteless, inappropriate, graphically violent, or pornographic. J.S. App. 37a; GXs 71, 83, 99, 247. Under appellees' theory, even though a public library's judgment to exclude such material from numerous other collections is entirely permissible, precisely the same judgment becomes constitutionally suspect when applied to a library's Internet-connected computers. Furthermore, under appellees' theory, a library's judgment not to permit access to e-mail, chat rooms, game sites, or dating services would be subject to either strict scrutiny or the heightened scrutiny that is applicable to time, place, and manner restrictions in a traditional public forum.

Appellees' approach lacks coherence. If a public library has broad discretion—as it surely does—to refuse to collect pornographic magazines, XXX videos, and other material that can be readily found at the nearest adult book store, or any of a myriad other available Internet-connected computers, it should have the same discretion to exclude that material from its computer monitors.

3. Appellees nonetheless struggle, and not without considerable irony, to distinguish a public library's Internet collection practices from its more traditional collection practices, and to impose stringent First Amendment burdens on libraries that simply do not exist in the law. None of their purported distinctions withstands analysis.

a. Multnomah County argues (Br. 39) that a public library's traditional collection practices are distinguishable because CIPA mandates filtering software for all public libraries and overrides local decisions. CIPA does not impose any such mandate. CIPA applies only to those public libraries that wish to receive Internet-related federal financial assistance and agree to accept filtering in order to do so. Those voluntary decisions by public libraries in assembling their collections are entitled to just as much deference as other collection practices. CIPA's effect is the same as if a private donor contributed funds to a library to build its collection on the condition that it not use the funds to purchase pornography. The First Amendment surely allows the library to make the choice to accept such conditional grants from public as well as private donors. Moreover, Multnomah County's purported distinction provides no support for the district court's holding that public libraries that use filtering software, even without any federal assistance, violate the First Amendment rights of their patrons.

b. Appellees also contend (Multnomah County Br. 39; ALA Br. 24) that libraries' Internet collection practices are different from their book selection practices because librar-

ies pre-approve the books they make available, but do not pre-approve the Web sites they make available. Appellees do not explain why a library's discretion to make choices disappears when it decides what not to accept rather than what affirmatively to accept. A public library could, of course, limit its Internet collection to just those sites it pre-screened, but only at the cost of excluding an enormous amount of valuable information that it lacks the capacity or resources to review. Faced with that choice, it is eminently reasonable for a public library to choose not to pre-screen all material, but instead to focus on the categories of material it determines to be inappropriate, wasteful, unnecessary or incompatible with its policies. Indeed, because that approach makes *more* information available than the alternative of offering only pre-selected sites, it is difficult to understand why either appellees or the First Amendment would favor mandatory pre- screening.

c. Appellees also err in contending (Multnomah County Br. 40-41; ALA Br. 24) that a library's Internet collection is distinguishable from its book collection because filtering software companies do the hard and resource-intensive work of choosing which particular Web sites to exclude, while librarians generally choose the books that are included. Libraries exercise significant editorial judgment in selecting both the particular software they use and the filtering categories they will enable. When a library chooses to enable the pornography category, that is comparable to a judgment not to collect pornographic books. Libraries also retain the capacity to determine whether the filter is excluding sites that the library would prefer to make available, and they can simply adjust the filters to unblock those sites. J.S. App. 52a. Thus, when library staff members determine that filtering software excludes sites that are not pornographic, they can adjust the filter to unblock those sites.

Moreover, in developing their book collections, libraries also rely on third parties. They often rely on journal reviews and bibliographies to select their books, and they sometimes delegate to third-party vendors the task of supplying books that satisfy their collection standards. J.S. App. 35a. ALA seeks to distinguish that practice on the ground that public libraries retain ultimate control over their book collections. But since libraries can add or delete sites from a blocking category, the same is true of their Internet collections.

B. A Library's Internet-Connected Computers Are Not Analogous To A Traditional Public Forum

Multnomah County contends (Br. 24-26) that strict scrutiny applies to a public library's use of filtering software to block material covered by CIPA because a library's Internet-connected computers are analogous to a traditional public forum. That contention is utterly unsustainable. Traditional public forum principles apply only to those places, such as public streets and parks, that have "immemorially been held in trust for the use of the public and, time out of mind, * * * been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 679 (1992). The Court has explicitly "rejected the view that traditional public forum status extends beyond its historic confines." *Forbes*, 523 U.S. at 678.

In any event, there is no coherent analogy between Internet access on a computer screen in a public library and a traditional public forum. Multnomah County argues (Br. 24) that the two are analogous because a public library is a quintessential locus for the receipt of a wide array of information. But public sidewalks and parks are not traditional public fora because they are places where a wide array of information may be received. In fact, the range of information they afford may often be quite limited. Rather, parks and sidewalks are public fora because private speakers, and not the

government, have always determined the content of the speech that a person may receive there. In contrast, the amount and nature of information that may be obtained in a public library has always been determined by the public library itself, within the funding and other limitations set by the governmental body that established and supports it.

Nor is appellees' analogy assisted by Multnomah County's observation (Br. 26) that the Internet contains more information than is available in a traditional public forum. The Internet itself is not at issue here. Instead, what is at issue is the material from the Internet that a library chooses to make available on its own computers on its own premises. If a library's status as a place to obtain information and its willingness to provide a wide array of information to the public were sufficient to trigger the doctrines applicable to a traditional public forum, strict scrutiny would also apply to a public library's content-based book selections. That consequence of appellees' theory demonstrates that their analogy is fundamentally misconceived. While a public library is generally—but not always—a place where a wide array of information may be obtained, the information that may be obtained has always been whatever the library chooses to provide, and nothing more.

C. A Public Library's Internet-Connected Computers Are Not Designated Public Fora, But Even If They Were, The Library's Content-Based Collection Decisions Would Not Be Subject To Strict Scrutiny

1. Appellees are also mistaken in contending (Multnomah County Br. 27-29; ALA Br. 19-22) that a public library's Internet collection decisions are subject to strict scrutiny because libraries create a designated public forum when they furnish material from the Internet. A designated public forum is created only when the government makes an affirmative choice to open up its property for use as a public forum, *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*,

460 U.S. 37, 46 (1983), not "by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius* v. *NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985).

Under those principles, a public library that installs computer terminals on its premises and connects them to the Internet does not thereby create a designated public forum. The computer terminals are simply added to and subsumed in the overall resources of what is, after all, a *library*, and the computer terminals thus assume the essential character of the other resources the library has assembled in aid of its mission. Accordingly, a library that acquires computer terminals and connects them to the Internet cannot properly be understood as "intentionally" opening up its facilities, equipment, and Internet collection as a forum for "public discourse" by Web publishers within the meaning of this Court's cases, *Cornelius*, 473 U.S. at 802—any more than a library's acquisition of books for its collection creates a designated public forum for "public discourse" by authors and publishers. Rather, the library has made its information-gathering tools available to its patrons to be used in the way that a library's collection, including other reference material, generally is used. See *id.* at 801-802, 805-806.

That is especially so with respect to a public library that connects to the Internet with federal assistance. E-rate discounts are available only for "educational" purposes, 47 U.S.C. 254(h)(1)(B), and assistance under the Library Services and Technology Act is intended "to stimulate excellence and promote access to learning and information resources" in libraries. 20 U.S.C. 9121(2). A public library that connects to the Internet with federal assistance necessarily seeks to further those purposes, and not some broader goal of opening a public forum for public discourse by Web publishers. The library's Internet-connected computers therefore are simply information-gathering tools that, consistently

with the limitations Congress has imposed, serve to supplement the library's traditional collections.

Appellees contend (Multnomah County Br. 28; ALA Br. 20-21) that a public library's Internet-connected computers become designated public fora because of the breadth of information that is available on them. But if that were sufficient to create designated public fora, a public library's bookshelves would also qualify. And if that were the test, public television stations would create a designated public forum by offering diverse programming, and the National Endowment for the Arts would create a designated public forum by funding a wide array of art. As those examples demonstrate, a designated forum is not created simply because the government chooses to furnish a wide array of information—especially where, as here, it does so through its own equipment on its own premises.

2. Even if a public library that connects to the Internet with federal assistance has thereby created a designated public forum, that forum would necessarily be limited to the educational and informational purposes for which it was created. *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). In the context of limited public fora, the Court has drawn a distinction between content-based and viewpoint-based distinctions. *Id.* at 829-830. A content-based limitation is permissible if it is reasonable in light of the purposes of the designated forum. *Ibid.* A viewpoint-based exclusion, by contrast, is presumptively impermissible. *Ibid.* --

The use of filtering software to block access to pornographic material covered by CIPA is content-based, not viewpoint-based. Accordingly, even if a library's Internet-connected computers were treated as a designated public forum, the use of filtering software to block access to material covered by CIPA would not be subject to strict scrutiny. Instead, the relevant question would be whether the use of

filtering software is reasonable in light of the informational and educational purposes of that designated public forum. Plainly, a library could permissibly conclude that the exclusion of Internet pornography is reasonably related to those purposes, just as libraries have traditionally done respecting pornographic books.

The designated public forum cases cited by appellees are consistent with that analysis. In *Rosenberger*, 515 U.S. at 831-832, the Court applied strict scrutiny to an exclusion from a designated public forum based on religious viewpoint. The exclusion invalidated in *Widmar* v. *Vincent*, 454 U.S. 263, 269-270, (1981), was also based on religious viewpoint. Similarly, in *City of Madison School District No. 8* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167, 175-176 (1976), the Court subjected to strict scrutiny and invalidated a law that allowed "one side of a debatable public question to have a monopoly in expressing its views to the government."

ALA contends (Br. 26-27) that permitting the government to define the forum through the use of reasonable content-based distinctions would empty designated public forum analysis of any meaning. That concern is misguided. As *Rosenberger* makes clear, the government may not define a designated forum in terms of particular viewpoints, and then justify viewpoint-based distinctions as tailored to further the purposes of the forum. In addition, any content-based exclusions that are not viewpoint-based must still be justified as reasonable in light of the purposes of the forum.

D. Filtering Software Is A Reasonable Means For A Library To Ensure That It Does Not Furnish Pornography To Its Patrons

1. Appellees err in contending (Multnomah County Br. 29-32; ALA Br. 29-30) that the use of filtering software is constitutionally deficient because all leading commercial filters block some constitutionally protected speech. Just as

a library may choose not to purchase a book or magazine that has both pornographic and non-pornographic content, it may reasonably conclude that it is better to have an effective mechanism for blocking pornographic material than it is to abandon any such safeguard in order to guarantee that no single constitutionally protected Web site is excluded.

Appellees vastly overstate the amount of material that is erroneously excluded by filtering software. The district court estimated that tens of thousands of Web pages are erroneously blocked. J.S. App. 93a. But that represents a minute percentage of the two *billion* pages that are on the Internet. *Id.* at 30a. The district court's finding is consistent with evidence offered by appellees' own expert. Of the sites he examined, less than 1% were erroneously blocked. *Id.* at 79a-85a.[1] A recently released study shows that a filter set to block only pornography blocks only 1.4% of all health sites. Caroline R. Richardson et al., *Does Pornography-Blocking Software Block Access to Health Information on the Internet?*, 288 JAMA 2887, 2891-2892 (2002).[2] Other evidence in the record shows that an even smaller percentage of material sought by library patrons is actually blocked.[3] Accordingly, a patron will only infrequently confront a site that is erroneously blocked. Moreover, because a standard Internet search ordinarily produces multiple sites addressing the same topic, an erroneous block will not have significance unless the person conducting the search is looking for information that can only be found on that one site.

[1] Appellees disavow (Multnomah County Br. 30 n.2; ALA Br. 32 n.31) the significance of their expert's testimony, but the district court relied on that testimony, J.S. App. 84a-85a, and appellees have not shown that reliance to be clearly erroneous. There is no reason to believe that the estimate based on the testimony of appellees' expert significantly understates the percentage of erroneous blocks. Indeed, appellees' expert skewed his results in two ways that would tend to overestimate the percentage of sites erroneously blocked. First, his sample consisted of sites that were more likely to be erroneously blocked. *Id.* at 85a. Second, he counted a site as erroneously blocked if any one of the software programs erroneously blocked it. *Id.* at 79a.

[2] ALA notes (Br. 32-33 n.31) that the same study shows that a filter set to block pornography blocks 10% of the sites using the search terms safe sex, condom, and gay. 288 JAMA at 2891. That still leaves 90% of those sites accessible. A library collection that contained 90% of all books on a particular topic would be extraordinarily inclusive, not constitutionally suspect. The same is true for Web sites.

If that happens, a patron need only ask a librarian to unblock the site. As the district court found, a library has the capacity to permanently unblock any erroneously blocked site. J.S. App. 52a. Asking a librarian to unblock a site is no different from requesting a librarian to retrieve a book that is not on the library's open stacks or to obtain a book by interlibrary loan. ALA complains (Br. 37) that CIPA permits, but does not require, a library to unblock an erroneously blocked site. That complaint is misguided. The district court found that libraries routinely respond to requests to unblock erroneously blocked sites. J.S. App. 46a. Moreover, librarians have a professional duty to assist patrons in finding information, and ALA offers no reason to believe that they will shirk that responsibility when it comes to responding to unblocking requests. In any event, the possibility that they might do so does not render CIPA itself unconstitutional, either on its face or as applied.

Multnomah County notes (Br. 35) that CIPA establishes certain limitations on disabling a filter. But those limitations apply only when a library wishes to disable the filter altogether, thereby permitting access to material that is child pornography, obscene, or harmful to minors. A library that receives Internet-related federal assistance has *unrestricted* freedom to unblock *any* site that does not fall within those

[3] Biek Test. 76 (Tacoma filter intercepts occur in .5%-.6% of the attempts to load a URL); Joint Exh. 6 (McBride Dep.), at 47 (at Greenville County Library System, the ratio of blocked sites to sites requested is approximately .005%).

categories. Appellees persistently blur the distinction between unblocking and disabling, but they are two very different ways of assisting patrons who wish to view blocked material.

Even with respect to disabling, CIPA's limitations are minimal. Under CIPA, at least with respect to adults, a filter may be disabled for any lawful purpose. 20 U.S.C. 9134(f)(3) (disabling permitted for both adults and minors); 47 U.S.C. 254(h)(6)(D) (disabling permitted for adults).

Appellees argue (Multnomah County Br 36-37; ALA Br. 37-38) that unblocking and disabling are inadequate because some patrons may be too embarrassed to ask for assistance from a librarian, and because a request may not be processed immediately. J.S. App. 172a. That criticism is unpersuasive. Requesting assistance is the standard way to obtain books in a closed stack, behind the reference desk, or through interlibrary loan. Similarly, a library patron seeking a book that has been checked out or a book that can be obtained only through interlibrary loan must ordinarily wait some period of time before obtaining it. There is no reason that the Constitution should require a library to adopt a different set of procedures to handle unblocking requests. But to the extent that a library may wish to take additional measures to facilitate unblocking requests, such as permitting them to be made anonymously, or expediting their processing, nothing in CIPA precludes it from doing so.[4] And if libraries are

[4] Because of the distinctive features of public libraries, appellees err in relying on decisions in which the Court has condemned schemes that required persons to seek permission to engage in activity protected by the First Amendment. *Lamont* v. *Postmaster Gen.*, 381 U.S. 301 (1965) (permission to receive certain mailings); *Denver Area Educ. Telecom. Consortium, Inc.* v. *FCC*, 518 U.S. 727 (1996) (request to receive sexually explicit programming); *Watchtower Bible & Tract Soc'y of N.Y., Inc.* v. *Village of Stratton*, 536 U.S. 150 (2002) (permission to conduct door-to-door canvassing). The routine practice of seeking assistance from a professional librarian in obtaining material from the library's own collection is nothing like the schemes at issue in those cases.

unwilling to unblock particular sites, the sites are available on countless Internet-connected computers throughout the country.

2. Appellees contend (Multnomah Br. 33-34; ALA Br. 34-35) that there are less restrictive and equally effective ways to preclude library patrons from receiving access to illegal and harmful pornography on library computers. However, they conspicuously fail to defend the principal alternative identified by the district court—a tap-on-the-shoulder policy. Appellees apparently share the government's view (Gov't Br. 37-38) that such a policy is far more intrusive, restrictive, inefficient, ineffective, and burdensome on library staff than filtering software.

Multnomah County proposes (Br. 33-34) as a less restrictive alternative that a library simply announce its policy and hope that library users who agree to comply with it will do so. Evidence in the record shows that even a policy that is enforced through active monitoring is not as effective as the use of filtering software in preventing deliberate efforts to obtain pornography. J.S. App. 40a. A policy that does not involve any active monitoring, like the one Multnomah County proposes, would be even less effective. In addition, the process of securing such agreements would pose extra burdens on both library staff and patrons, and would require a library staff to bring up the subject of pornography with patrons in a way that could be offensive to the patrons and detract from their use of the library.

ALA proposes (Br. 35) as its featured alternative that a library offer optional filtering software to adults, and require young minors to obtain parental permission to use an unfiltered computer. ALA's optional filtering alternative does nothing to address a library's legitimate concern that many adults in public libraries deliberately use the library's computers to seek pornography on the Internet. ALA's parental consent proposal is equally flawed. Libraries have a legiti-

mate interest in ensuring that their computers are not used by minors to obtain pornography, regardless of whether parents give them permission to do so.[5]

3. Appellees' attack on filtering software ultimately reduces to an argument that it is not a perfect solution to the problem. But even when strict scrutiny applies, perfection is not required. Here, however, strict scrutiny is not applicable. Rather, at most, a library that uses filtering software must show that it is a reasonable way to further the library's traditional educational and informational mission. Appellees' objections do not come close to showing that filtering software fails to satisfy that standard.

II. CIPA DOES NOT IMPOSE AN UNCONSTITUTIONAL CONDITION ON THE RECEIPT OF FEDERAL ASSISTANCE

1. Appellees contend (Multnomah County Br. 45-48; ALA Br. 38- 50) that the district court's judgment may be affirmed on the alternative ground that CIPA imposes an unconstitutional condition on the receipt of federal assistance. Relying on *Legal Services Corp.* v. *Velazquez*, 531 U.S. 533 (2001), they argue that CIPA's filtering conditions "distort" the function of public libraries (Multnomah County Br. 48) and "suppress speech inherent" in those libraries (ALA Br. 48). Appellees' reliance on *Velazquez* is wholly misplaced. In that case, the federal funding program prohibited attorneys from advocating against the government —a role that was perceived in that context to be indispensable to the proper functioning of the judicial process. The

[5] The other alternatives suggested by appellees—privacy screens, recessed monitors, training on Internet use, placing computers in areas of high traffic either do not address a library's interest in preventing its computers from being used by persons who seek out material covered by CIPA, or are substantially less effective than filtering software. See Gov't Br. 38-39. Those alternatives also are not as effective in preventing inadvertent exposure to material covered by CIPA. *Id.* at 39.

funding restriction also disfavored certain speech based on its viewpoint. Neither of those distinctive features is present here. Public libraries do not have an adversarial relationship with the government that would be compromised by accepting federal funding on the conditions established under CIPA, and those conditions do not make any distinctions based on viewpoint.

Moreover, CIPA's conditions do not in any sense distort a library's function or suppress speech inherent in that setting. Neither the collection of pornographic visual depictions nor the provision of unfiltered Internet access is inherent in the traditional role of public libraries. Libraries have never had as their goal "universal coverage," J.S. App. 34a, and indeed have historically *not* included pornography in their collections. Thus, many libraries have found that filtering software furthers rather than distorts their traditional educational and informational mission, because it gives them the flexibility to block access to material that is outside their collection boundaries, while reserving use of their computers for legitimate research and information gathering. And because CIPA permits unblocking, libraries that wish to provide the maximum amount of lawful information are free to do so.

ALA asserts (Br. 41-42) that CIPA distorts a public library's function and suppresses speech inherent in that setting simply because it removes discretion from public libraries to decide for themselves whether to use filtering software. That assertion is inconsistent with ALA's contention elsewhere (Br. 17-38) that public libraries lack any discretion at all under the First Amendment to use filtering software. It also is without merit. To the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance. If a library wishes to receive federal assistance, however, Congress has wide latitude to

establish conditions that ensure that the assistance will be used for the purposes that Congress intended.

Rust v. *Sullivan*, 500 U.S. 173 (1991), is controlling on that point. In that case, the Court held that Congress has authority to insist "that public funds be spent for the purposes for which they were authorized." *Id.* at 196. ALA errs in characterizing *Rust* (Br. 40-41 & n.39) as a case involving government speech. The *Rust* Court held that Congress could impose the funding condition because "when the Government appropriates public funds to establish a program, it is entitled to define the limits of that program." 500 U.S. at 194. Here, Congress has defined its program as one that seeks to facilitate Internet access at libraries for educational and informational purposes, which Congress has reasonably determined should entail corresponding restrictions on using the program to make available material that is obscene, child pornography, or harmful to minors. Because the use of filtering software helps to carry out the program as so defined, it is a permissible condition under *Rust*.

2. Appellees alternatively contend (Multnomah County Br. 45-46; ALA Br. 43-44) that CIPA exceeds permissible limits because it applies to every computer at a library that receives assistance, even those purchased and connected without federal assistance. As an initial matter, that question does not need to be resolved in this facial challenge. If a particular library wishes to use non-federal funds to offer unfiltered access on a particular computer at the library, it may raise that issue in an as-applied challenge. In any event, CIPA's "any computer" condition is a permissible exercise of Congress's spending power. Under the Spending Clause, Congress is entitled to "require[] a certain degree of separation" from the E-rate and LSTA programs "in order to ensure the integrity" of those programs. *Rust*, 500 U.S. at 198. Permitting public libraries to offer unfiltered access at

the very facilities that receive Internet-related assistance would undermine the integrity of those federal programs.

Multnomah County errs in arguing (Br. 45-46) that CIPA's "any computer" condition conflicts with this Court's decision in *FCC* v. *League of Women Voters*, 468 U.S. 364, 400 (1984). In that case, the Court invalidated a funding restriction on editorializing because it prohibited recipients from editorializing through a separate affiliate. *Ibid.* CIPA does not suffer from that vice. A recipient that wishes to offer unfiltered access outside the scope of the federal program may do so through an affiliated library that does not receive federal Internet-related assistance.

ALA is mistaken in claiming (Br. 44) that CIPA does not afford that option. Under its express terms, CIPA's conditions attach only to the computers of the particular libraries that receive Internet-related assistance. 20 U.S.C. 9134(f)(1)(A) and (B); 47 U.S.C. 254(h)(6)(B) and (C). An affiliated library receiving no federal assistance is therefore not covered. That is the way the federal enforcement agencies interpret CIPA, and that interpretation is consistent with both CIPA's text, and the principle that statutes should be interpreted to avoid constitutional questions, not to create them.

3. While the foregoing is sufficient to show that CIPA is not invalid on its face as imposing an unconstitutional condition, there is also a substantial question whether appellees may assert an unconstitutional conditions claim at all. The courts of appeals have uniformly concluded that government entities are not protected by the First Amendment. Gov't Br. 40-41. Moreover, while appellees wish to assert the rights of their patrons, this Court has never held that an unconstitutional conditions claim may be asserted on behalf of persons upon whom no conditions have been imposed. See *id.* at 41-42. All of the cases cited by appellees for that proposition (Multnomah County Br. 46; ALA Br. 45-46)

involved one or more recipients upon whom an allegedly unconstitutional condition had been imposed, so the Court had no occasion to resolve the question.[6]

ALA contends (Br. 48-49) that if municipalities have no First Amendment rights, there is no limit on the speech restrictions that Congress could impose on municipalities directly or though funding conditions. That contention is incorrect. The Tenth Amendment would place some limits on direct restrictions, and the Spending Clause requires that any speech-related or other conditions must be related to the purposes for which the assistance is provided. See *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987).[7]

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The judgment of the district court should be reversed.

Respectfully submitted.

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Solicitor General

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[6] The Court's decision in *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978), does not assist appellees. The Court's holding that a private corporation may assert that restrictions on its speech violate the First Amendment does not imply that a public entity may.

[7] Multnomah County errs in arguing (Br. 42-45) that a public library's use of filtering software constitutes an impermissible prior restraint on speech. A library's use of filtering software is no more a prior restraint on speech than is its refusal to provide patrons with pornographic magazines. Both are collection decisions that affect only what material may be obtained from the library, not from private sources. Multnomah County sees a difference where the use of filtering software results from CIPA, rather than a local library's own decision. But where CIPA applies, local libraries have voluntarily agreed to install filtering software as a condition of receiving federal Internet-related assistance. The installation of such software therefore *does* result from local library decisions. In any event, prior restraint doctrine does not depend on whether an action is locally or federally inspired, but on whether the action is a prior restraint on speech. CIPA imposes no such restraint.

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No. 02-361

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., *Appellants,*

v.

AMERICAN LIBRARY ASSOCIATION, INC., ET AL., *Appellees.*

On Appeal From the United States District Court
for the Eastern District of Pennsylvania

Brief Amicus Curiae of the American Center for Law and Justice and Hons. Robert B. Aderholdt, Todd Akin, Michael Collins, Jo Ann S. Davis, Duncan Hunter, Ernest Istook, Jr., Charles Pickering, Jr., Jim Ryun, John M Shimkus, and John Sullivan Supporting Appellants

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INTEREST OF AMICI*

The American Center for Law and Justice (ACLJ) is a public interest law firm committed to insuring the ongoing viability of constitutional freedoms in accordance with principles of justice. ACLJ attorneys have argued or participated as amicus curiae in numerous cases involving constitutional issues before this Court and lower federal courts, and Chief Counsel Jay Alan Sekulow has presented oral argument before this Court in eight cases.

As a public interest law firm, the ACLJ is dedicated to defending families against efforts to undermine their sovereignty, nature, and importance. Moreover, the ACLJ is committed to supporting appropriate efforts by Congress and the States toward the creation and sustenance of a social order that supports the important work of families: the rearing and protection of children. The proper resolution of this case is a matter of substantial organizational concern to the American Center for Law and Justice because of the ACLJ's commitment to American families.

This brief is also filed on behalf of Representatives Robert B. Aderholt, Todd Akin, Michael Collins, Jo Ann S. Davis, Duncan Hunter, Ernest Istook, Jr., Charles Pickering, Jr., Jim Ryun, John M. Shimkus, and John Sullivan. These amici currently are members of the United States House of Representatives in the One Hundred Eighth Congress. These Representatives disagree with the district court's decision in

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* This brief is filed with the consent of the parties, and letters indicating such consent have been filed with the Court. Pursuant to Rule 37.6, amicus ACLJ discloses that no counsel for any party in this case authored in whole or in part this brief and that no monetary contribution to the preparation of this brief was received from any person or entity other than *amicus curiae*.

American Library Assoc. v. United States and urge this Court to reverse it.

SUMMARY OF THE ARGUMENT

The question in this case is whether the First Amendment confers a right on library patrons to have government-subsidized, immediate access to all legal Internet materials by means of public library computers. To answer this question requires forum analysis, and the first step in that analysis is to identify the forum at issue. The forum at issue in this case is library computers, not the Internet. The central fault of the district court's decision was the court's conflation of these two different fora. Every error in the district court's opinion stems from this confusion. By focusing primarily on the nature of the Internet, and on the access sought by library patrons, the court ignored the centrality of government intent in its forum analysis. *See American Library Assoc. v. United States*, 201 F. Supp. 2d 401, 455-56 (E.D. Pa. 2002). Consequently, the court disregarded overwhelming record evidence that public libraries intend to regulate the use of their computers for Internet access in accordance with the same principles that govern the acquisition of other materials in their collections.

The vast majority of libraries attempt to restrict the use of their computers to research purposes, routinely barring patrons from using library computers with Internet access for entertainment, interpersonal communication, shopping, and the indulgence of prurient interests. *Id.* at 422-23. There is no constitutionally significant difference between the control libraries exercise over their collections as a whole, and the control they attempt to exercise over Internet access on their computers. The unmanageable size of the Internet and the resulting fact that libraries cannot review Internet materials as effectively as other materials does not justify depriving

libraries of reasonable measures, including filters, to regulate the use of their computers. The technical impossibility of excising only illegal materials from the Internet should not serve as a constitutional barrier to the use of filters when libraries already bar patrons from accessing other legal materials on the Internet. This Court's public forum doctrine does not require balkanization of a public library's collection such that a public library's control over scarce resources varies from medium to medium. A library's collection is a nonpublic forum, and public libraries may, consistent with the First Amendment, retain editorial control over all sources of information within the library's collection.

Confusing the Internet with public library computers also led the district court to erroneously conclude that a library's use of filtering technology distorts the medium of the Internet. Unlike the cases in which this Court has struck down laws that targeted speech within a medium because they distorted the medium's usual functioning,[1] filters have no effect on the Internet itself. Filters only affect what is accessible on a specific computer. Internet speech remains intact and is accessible on innumerable other computers and from other sources. If a library's use of filters distorts the Internet, then a library's decision to discard the classified ads from a single newspaper distorts the news media.

Finally, library patrons do not have a constitutional right to anonymous and immediate access to Internet materials on library computers. The district court erred in holding that the First Amendment confers such a right that is violated if patrons must request the disabling of a filter that has blocked constitutionally protected material. The First Amendment provides no warrant for extending this Court's decisions affirming a right to receive information

[1] *See, e.g., Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001); *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

anonymously to information obtained on government property at government expense. The creation of such a right threatens the existence of public libraries, which must require patrons to divulge their identity in a number of ways.

Because public libraries may use filters to regulate Internet access on their computers without violating the First Amendment, the Children's Internet Protection Act, which merely encourages the use of filters, is constitutional.

ARGUMENT

The First Amendment does not confer a right on library patrons to have government-subsidized, immediate access to all legal Internet materials by means of public library computers. This Court repeatedly has rejected the notion that constitutional rights must be subsidized by the government to be fully realized. *See NEA v. Finley*, 524 U.S. 569, 585-88 (1998); *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672-675 (1998); *Rust v. Sullivan*, 500 U.S. 173, 193-94 (1991). *Maher v. Roe*, 432 U.S. 464, 479 (1970). The First Amendment right to receive information does not obligate the government to provide instantaneous access to such information on government property, even if the government property is dedicated to the exchange of ideas.

I. THE FIRST AMENDMENT PERMITS PUBLIC LIBRARIES TO USE FILTERING TECHNOLOGY BECAUSE LIBRARY COLLECTIONS, INCLUDING COMPUTER TERMINALS WITH INTERNET ACCESS, ARE NONPUBLIC FORA, AND FILTERS HAVE NO EFFECT ON WHETHER SPEECH OCCURS.

As the district court recognized,[2] the proper analytical framework for evaluating the constitutionality of the Children's Internet Protection Act (CIPA) is provided in *South Dakota v. Dole*, 483 U.S. 203 (1987). Under *Dole*, when Congress attaches conditions to a state agency's receipt of federal funds, those conditions may not require the state agency to violate the Constitution. 483 U.S. at 208. CIPA's provisions are therefore unconstitutional only if the First Amendment forbids libraries from using filtering technology to ensure that scarce computer terminals are used in ways compatible with the library's mission. Because library computer terminals, like the rest of a library's collection, are nonpublic fora, libraries are free, under the First Amendment, to impose content-based restrictions, including filtering technology, on Internet access.

A. Government Intent is Central When Defining the Contours of a Government Forum.

The public's First Amendment right of access to government property depends upon the nature and character of the property. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800-01 (1985); *Perry Educ. Ass'n*

[2] *See American Library Assoc. v. United States*, 201 F. Supp. 2d 401, 450 (E.D. Pa. 2002).

v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45-47 (1983). With regard to property that is not a traditional public forum, the government's intent is the starting point in forum analysis, because "the government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius* 473 U.S. at 802. Analyzing intent is crucial, because the "State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Greer v. Spock*, 424 U.S. 828, 836 (1976) (quoting *Adderley v. Florida*, 385 U.S. 39, 47 (1966)); *Perry Educ. Ass'n*, 460 U.S. at 46; *Cornelius*, 473 U.S. at 800. The "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981). In particular, the state must have "substantial discretion" in determining how to allocate scarce resources to accomplish its mission. *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995). Furthermore, "the government need not wait until havoc is wreaked to restrict access to a nonpublic forum. . . . The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would . . . hinder its effectiveness for its intended purpose." *Cornelius*, 473 U.S. at 810-11.

Where government resources, such as computer terminals, are scarce,[3] the centrality of governmental intent in forum analysis is inextricably linked to the promotion of First Amendment activity on government property:

[3] The district court found that in most public libraries, computer terminals are scarce, and that demand often exceeds supply. *See* 201 F. Supp. 2d at 465.

> We encourage the government to open its property to some expressive activity in cases where if faced with an all-or-nothing choice, it might not open the property at all. That this distinction [between general and selective access] turns on government intent does not render it unprotective of speech. Rather it reflects the reality that, with the exception of traditional public fora, the government retains the choice of whether to designate its property as a forum for specified classes of speakers.
>
> . . . .
>
> Were it faced with the prospect of cacophony, on the one hand, and First Amendment liability on the other, a public television broadcaster might choose not to air candidates' views at all. A broadcaster might decide "the safest course is to avoid controversy, ... and by so doing diminish the free flow of information and ideas."

Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 680-81 (1998) (citations omitted). *Cf. Widmar v. Vincent*, 454 U.S. 263, 278 (1981) (Stevens, J., concurring) (where government facilities, such as university meeting rooms, are scarce, government may, consistent with the First Amendment, promote some uses over others).

The district court ignored the centrality of government intent in forum analysis. Examining this Court's public forum jurisprudence myopically, the district court held that the forum is defined by the "specific access that the plaintiff seeks." *See American Library Assoc. v. United States* 201 F. Supp. 2d 401, 455 (E.D. Pa. 2002). "[T]he right at issue in this case is the specific right of library patrons to access information on the Internet, and the specific

right of Web publishers to provide libraries with information via the Internet." *Id.* Thus, according to the district court, a library has no authority to restrict Internet access (other than for illegal materials), if a patron seeks access to all that is available on the Internet. The district court's forum analysis derailed on the superficially enticing, but false notion that because the Internet itself is a public forum, library computer terminals offering such access are public fora.

1. The district court ignored overwhelming evidence that public libraries intend to restrict the use of library computers in accordance with the principles that govern acquisition and retention of materials in their collection.

The district court had no trouble recognizing that library print collections are nonpublic fora. 201 F. Supp. at 462. Because libraries have limited resources, libraries must have the liberty to select materials in keeping with their missions. Due to the substantial amount of editorial discretion libraries exercise in acquiring their collections, such collections are nonpublic fora. *Cf. Arkansas Educ. Television Comm'n*, 523 U.S. at 675 (forum analysis is inappropriate because public broadcasting station has limited resources and must use editorial discretion in scheduling programming). *See also National Endowment for the Arts v. Finley*, 524 U.S. 569, 586 (1998) (forum analysis did not apply, in part, because the NEA's decisions about which art to subsidize necessarily involved content-based judgments).

The district court also recognized that library computers are part of a library's limited resources. *See* 201 F. Supp. 2d at 465. Shifting focus from the library's computers to the Internet itself, however, the court held that

because the Internet is "a vast democratic forum," content-based restrictions on access at library computers are subject to strict scrutiny. *Id.* at 463-64. Thus, the court concluded the First Amendment requires that library computers with Internet access serve as the conduit for all legal materials on the Internet, irrespective of how a library intends that its computers be used. In so holding, the district court failed completely to consider both the character of public libraries, as well as the current policies of the vast majority of public libraries offering Internet access.

While public libraries are certainly devoted to "freewheeling inquiry," *Board of Educ. v. Pico*, 457 U.S. 853, 915 (1982) (Rehnquist, J., dissenting), they are also "dedicated to quiet, to knowledge, and to beauty," *Brown v. Louisiana*, 383 U.S. 131, 142 (1966). There was abundant evidence in the record that the vast majority of public libraries impose content-based restrictions on Internet access in accordance with these principles. Many libraries prohibit the viewing of legal pornography. *See* 201 F. Supp. at 422-23. Many others prohibit the viewing of all sexually explicit materials. *Id.* at 423. Still others bar the use of e-mail, chat rooms, and computer games. *Id.* at 423. A recent report found that nearly half of all public libraries with Internet access use filtering technology.[4] The nearly universal use of content-based restrictions demonstrates an intent to control Internet access just as libraries control acquisition of their print collections. A library's offerings reflect the character of a public library as a place dedicated to the pursuit of knowledge. Libraries do not intend to confer carte blanche access to their computer terminals just because the Internet is an unlimited medium.

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[4] *See* Cheryl Wetzstein, *Study Finds Porn Filters Leave Health Web Sites*, WASHINGTON TIMES, Dec. 11, 2002, available at http://www.washtimes.com/national/20021211-57400.htm.

More importantly, the ability to impose content-based restrictions on Internet access is clearly crucial to many libraries' decision to offer such access. Faced with the Hobson's choice thrust upon them by the district court's decision, many libraries will undoubtedly cease offering Internet access. Fears about stanching the "free flow of information and ideas," *Arkansas Ed. Television*, 523 U.S. at 681, will become reality. It is hard to see how the public interest will be better served by having no public Internet access than substantially increased, free Internet access with limited restrictions. Surely, this is not what the First Amendment requires.

The district court's decision has disturbing implications for any government entity that provides computers with Internet access. If "the access that is sought," is the dispositive factor, *see* 201 F. Supp. 2d at 455, and providing Internet access on a government computer converts the computer into a public forum by virtue of the nature of the Internet as a vast democratic forum, government entities are constitutionally barred from placing content-based restrictions on the use of those computers. Thus, a state law restricting public employees from accessing sexually explicit materials on the Internet while using government computers would presumably be unconstitutional. *See, e.g.*, Va. Code Ann. §§ 2.1-804 to -806 (Michie Supp. 1999). As one federal appellate court has already held, such a bizarre conclusion finds no refuge in the First Amendment, even when the government property at issue is dedicated to the free exchange of ideas. *See Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000) (en banc) (upholding constitutionality of Va. Code Ann. §§ 2.1-804 to -806 as applied to public university faculty).

2. This Court's public forum cases do not require gerrymandering a library's collection according to the type of medium.

The First Amendment does not require library computers to be segregated from the rest of a library's collection for purposes of forum analysis. The district court held that the First Amendment required disparate treatment of a library's computer terminals because of the uniqueness and vastness of the Internet as a medium. Therefore, according to the court, because libraries cannot, due to the immensity of the task, review all Internet materials, the First Amendment requires that they forfeit the right to exercise any content-based control over Internet access. *See* 201 F. Supp. 2d at 462-63.

There is no constitutionally sound basis for distinguishing between a library's print collection and its computer terminals with Internet access. Just as libraries need not provide the complete works of Jacqueline Susanne, they need not provide access to all that is on the Internet. If, for example, libraries offered cable television access to patrons, no one could seriously maintain that libraries must also offer the Playboy and Spice channels. If, however, excluding the Playboy and Spice channels also entailed the loss of the History and Discovery channels,[5] nothing in this Court's First Amendment jurisprudence suggests that such a loss would violate the First Amendment, even though both channels air constitutionally-protected material that the library might otherwise offer. The television belongs to the library; its decision about what programming to offer should

[5] As anyone with cable television service knows, most cable companies sell their services by offering packages whereby the subscriber must often accept subscription to undesired channels to receive desired channels.

not be the subject of judicial review any more than is its decision about what book to place on its featured best seller shelf. The technical infeasibility of surgically excising inappropriate material should not serve as a justification for compelling libraries to offer the Playboy and Spice channels.

The First Amendment protects against the official suppression of ideas, *see Regan v. Taxation With Representation*, 461 U.S. 540, 550 (1983), not against the removal (inadvertent or otherwise) of resources from government property. Removing materials from government property is no more an unconstitutional suppression than refusing to acquire the same materials. *See Pico*, 457 U.S. at 892 (Burger, C.J., joined by Rehnquist, J., Powell, J., and O' Connor, J., dissenting) (the coincidence of timing should not serve as the basis of a constitutional holding). *See also id.* at 916 (Rehnquist, J., dissenting) ("[T]his distinction between acquisition and removal makes little sense. The failure of a library to acquire a book denies access to its contents just as effectively as does removal of the book from the library's shelf.").

There is no constitutional right to have immediate, anonymous, government-subsidized access to all available speech, just because the speech is on the Internet. Just as nothing in the First Amendment compels a library to be the courier of what a private speaker has to say, nothing in the First Amendment confers a right to have certain speech "affirmatively provided at a particular place by the government." *Pico*, 457 U.S. at 888 (Burger, C.J., joined by Rehnquist, J., Powell, J., and O'Connor, J., dissenting).

> The government does not "contract the spectrum of available knowledge ... by choosing not to retain certain books on the school library shelf; it simply chooses not to be the conduit for that particular

> information. In short, ... *there is not a hint in the First Amendment, or in any holding of this Court, of a "right" to have the government provide continuing access to certain books.*

Id. at 888-89 (emphasis added).

To hold that the vastness of Internet resources precludes libraries from exercising editorial discretion over Internet access on scarce library computers imposes an untenable "all-or-nothing," choice on libraries. *Arkansas Educ. Tele. Comm'n*, 523 U.S. at 680. If library computers with Internet access are public fora, and any attempt to impose content-based controls on the use of library computers with Internet access meets with strict scrutiny, then any library patron would have a constitutional right to access any legal materials on library computers. Library patrons could, for example, download pornography, access dating services, or shop for "Beanie Babies," regardless of the fact that such activities are inconsistent with the traditional mission of public libraries, and therefore with library policies concerning preferred uses of scarce computer terminals. Under the district court's reasoning, what library patrons use computer terminals for when accessing the Internet (short of obscenity, child pornography, and with respect to minor patrons, material harmful to minors) is ultimately none of the library's business.[6] Therefore, even

[6] The district court was apparently undisturbed by the grave constitutional difficulties inherent in supposedly less restrictive means of controlling Internet use on library computers. For example, "tap on the shoulder" policies, *see, e.g.*, 201 F. Supp. 2d at 482, raise a far greater risk of intentional censorship than do filters. As the district court conceded, filters *inadvertently* block constitutionally protected speech, and such inadvertent blocking is easily remedied by disabling the filter. By contrast, a librarian taps a patron's shoulder *intentionally* and the patron has little choice but to obey the librarian, whether or not the material being viewed is constitutionally protected.

"tap on the shoulder" policies become constitutionally suspect.

The First Amendment does not forbid libraries from using reasonable tools to maximize preferred uses of library computers. Filters help libraries allocate the limited amount of Internet access they can afford in a manner most compatible with their role in the community.

B. Filtering Public Library Computers Does Not "Distort the Medium" of the Internet.

Again confusing the Internet itself with public library computers (which is the forum to which access is sought), the district court erroneously reasoned that because filters inadvertently block constitutionally protected speech, they distort the "marketplace of ideas that the state has created in establishing the forum." *See* 201 F. Supp. 2d at 461.

Far more egregious, however, is the violation of the librarian's and other patrons' interest in being free from unwanted exposure to highly offensive pornography. To effectively monitor patrons' access to illegal materials, librarians must necessarily be exposed to a range of sexually explicit material, including what most would consider grossly offensive. They cannot "avert their eyes," *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 (1975), and because they are captive as employees charged with the duty to monitor patrons' Internet use, their interest in being free from exposure to both legal and illegal pornography is violated. *See Rowan v. Post Office Dept.*, 397 U.S. 728, (1970). To say that librarians and patrons can look away "is like saying the remedy for an assault is to run to away after the first blow." *FCC v. Pacifica Foundation*, 438 U.S. 726, 749 (1978). Even assuming most libraries are able to find one librarian who is willing regularly to view online pornography, *see* F. Supp. 2d at 482, it is ridiculous to expect librarians to decide what is obscene when even this Court has struggled with such determinations. *See, e.g., Miller v. California*, 413 U.S. 15, 20-23 (1973) (acknowledging "the somewhat tortured history of this Court's obscenity decisions" due to the Court's concern that "in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression").

Filters do not distort the medium itself. They merely limit what may be *immediately* accessed on government property. In the cases relied upon by the district court, this Court struck down laws restricting speech on various media, because the laws themselves intentionally targeted what speakers could say in a given medium. *See, e.g., Reno v. ACLU*, 521 U.S. 844 (1997) (holding unconstitutional the Communications Decency Act which imposed *criminal* penalties on certain web publishers); *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (2002) (striking down provisions of the Child Pornography Prevention Act, a criminal statute targeting certain speech on the Internet); *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (striking down prohibition against editorial speech by public broadcasting stations); *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001) (declaring unconstitutional a ban on certain attorney speech because the ban distorted the traditional role of attorneys in presenting to the courts a full range of arguments on behalf of clients). In these cases, however, the concern about "distortion" arose because the law at issue intentionally targeted, and thus would have chilled, if not eliminated, speech within the medium itself.

By contrast, a library's use of filters, and therefore CIPA, has no effect on the Internet as a medium. Because filters are confined to individual computers, they do not affect speech on the Internet itself. They cause no "distortion" of the medium. Rather, filters only limit what is *immediately* available at public expense on library computers. The Internet exists unimpeded regardless of what public libraries do. If no library in the country provided Internet access, the current state of the Internet would be unaffected. By providing even filtered Internet access, libraries are expanding, not restricting patrons' Internet access. And, as with any speech, what may be

unavailable at a given library is certainly available in numerous other places, including other computers with Internet access. There is no First Amendment right to demand that government pay for access to speech that is fully available elsewhere.

That some residents in poor communities may not have other means of Internet access does not change this. This Court long ago rejected the notion that constitutional rights, even those of poor citizens, must be subsidized by the government to be fully realized. *See, e.g.*, *Maher v. Roe*, 432 U.S. 464, 469 (1970) (upholding Connecticut's decision not to subsidize indigent woman's right to abortion; "the Constitution does not provide judicial remedies for every social and economic ill"). There are innumerable sources of information, even about "sensitive issues" such as the practice of so-called safe sex. For example, the National Center for Disease Control provides this kind of information. While the Internet may often provide the most convenient source of information, it would be a stunning distortion of the First Amendment to say that it guarantees a right to receive information at public expense at the quickest and most convenient source. In any event, filters only temporarily limit access to constitutionally protected speech. Where filters block materials that libraries would normally make available, the material can be had for the asking, in no more intrusive a fashion than a request for an Inter-library loan.

In sum, library computers are one component of the library's collection. Library computers, like the library's print collection are a nonpublic forum. Libraries may accordingly place limitations on the acceptable subject matter that can be accessed "so long as the distinctions drawn [between acceptable and unacceptable subjects] are reasonable in light of the purpose served by the forum and

are viewpoint neutral." *See Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985). The mere risk of viewpoint discrimination is not enough to justify stripping libraries of their control over the use of computers with Internet access. *See Arkansas Educational Television*, 523 U.S. at 676. Limitations that libraries put on Internet access need not even "be the most reasonable," and "[t]he First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means of [receiving] a speaker's message." *Cornelius*, 473 U.S. at 808-09.

II. LIBRARY PATRONS DO NOT HAVE A FIRST AMENDMENT RIGHT TO ACCESS MATERIALS IN A LIBRARY'S COLLECTION IMMEDIATELY AND ANONYMOUSLY.

In addition to holding that library patrons have a First Amendment right to access any constitutionally protected speech on library computers, the district court held that the First Amendment guarantees patrons immediate and anonymous access to such speech. *See* 201 F. Supp. 2d at 486-87. Rejecting the government's argument that CIPA's disabling provisions cure any constitutional infirmity in CIPA, the court erroneously ruled that requiring patrons to request the disabling of a blocked website violated the First Amendment right to receive information anonymously. *Id.* The court reached this startling conclusion in the face of evidence that it was technically feasible for libraries to process requests for unblocking anonymously. *Id.* at 487. The court also ruled that even waiting for websites to be unblocked constituted an impermissible burden on library patrons' First Amendment rights. *Id.* Thus, according to the district court, because the Internet affords users the *possibility* of immediate, anonymous access to information, that possibility is transmogrified into a constitutional right

when using a library computer. This is so even though library patrons do not enjoy either anonymous or immediate access to other materials in a library's collection.

Anyone who has ever used resources in a public library knows that such use usually entails the loss of anonymity, and often a wait for desired materials. For example, library patrons may not even obtain a library card without divulging name, address, and phone number. Librarians can readily discover precisely what materials patrons have checked out. There is often an extended wait for a library's copy of a bestseller. Reference materials are often inaccessible and must be requested from reference librarians. Before requesting an Inter-Library loan, a patron usually must give librarians identifying information so that the library can notify the patron when the materials have arrived. There is often an extended wait before the materials arrive. Thus, the notion that library patrons have a constitutional right to immediate, anonymous access to materials in a public library's collection is patently absurd. If patrons do have such rights, then public libraries must dramatically change their traditional mode of operation. Indeed, no library could accommodate all these "rights" and remain a viable institution.

There is no constitutionally significant difference between an Inter-Library loan request and a request to disable an Internet filter. In both cases, the materials are not immediately available from a library's collection. In neither case is the potential embarrassment to the patron greater. Indeed, a library patron is more likely to secure access to a blocked website without having to reveal his identity than when requesting an Inter-Library loan.

This Court's decisions addressing the right to receive information anonymously are inapposite because they

concerned laws that burdened a private citizen's right to receive information in his own home. For example, in *Lamont v. Postmaster General*, 381 U.S. 301 (1965), this Court struck down a federal statute requiring recipients of communist propaganda through the mails to explicitly request delivery of such materials. In *Denver Area Educ. Telecomm Consortium v. FCC*, 518 U.S. 727 (1996), the Court held unconstitutional a law requiring cable operators to provide pornography only to those subscribers who requested it in writing. These cases provide no support for the novel assertion, which flies in the face of historical library practices, that library patrons have a constitutional right to anonymously access materials in a public library's collection.

Because the materials in a library's collection, even those on the library's computers with Internet access, belong to the library, the library may, without violating the First Amendment, establish the terms upon which library patrons can use them. Any other conclusion threatens the very existence of public libraries.

CONCLUSION

CIPA merely encourages libraries to do what the First Amendment permits, which is to exclude child pornography, obscenity, and materials harmful to minors from a nonpublic forum because they hinder the purposes that libraries serve. CIPA is not aimed at the suppression of ideas. It is aimed instead at the clearly proscribable evil of pornography in a public place that historically has been "dedicated to quiet, to knowledge, and to beauty." *See Brown v. Louisiana*, 383 U.S. 131, 142 (1966).

For the foregoing reasons, and those expressed in Appellants' brief, this Court should reverse the judgment below and hold that CIPA is constitutional.

Respectfully submitted,

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BRIEF OF THE STATE OF TEXAS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

Whether public libraries' use of filtering devices on computers used by library patrons for Internet access violates those patrons' rights under the First Amendment.

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BRIEF OF THE STATE OF TEXAS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

The State of Texas, as *amicus curiae*, files this brief in support of Appellants and asks the Court to reverse the judgment of the lower court and hold that public libraries may constitutionally utilize Internet filtering software on computers used by library patrons.

INTEREST OF *AMICUS CURIAE*

The First Amendment issue in this case is of great importance to the people of Texas. The lower court's erroneous decision that the First Amendment prohibits public libraries from utilizing filtering software on computers used by library patrons for access to the Internet will likely result in children being exposed to obscene, indecent, and harmful material—and inhibit efforts to combat Internet-related crimes against children. Moreover, the

lower court's erroneous First Amendment holding could prevent Texas from enacting and enforcing, as an exercise of its police powers, laws mandating or even encouraging use of filtering software in its public libraries. It also will restrain public libraries from enforcing Internet use policies that regulate what content may be accessed. Texas does not prescribe specific Internet use policies for its libraries, but instead encourages libraries to formulate policies that reflect individual community standards. Texas, other states, the federal government, and individual libraries must retain the ability to protect children from exposure to the enormous amount of pornographic and other harmful material present on the Internet.

Texas has placed a high priority on the prevention and prosecution of computer and Internet-related crime, including child pornography. Two years ago the Texas Attorney General created the Internet Bureau to assist local law-enforcement agencies in combating computer and Internet-related crimes. The mission of the Internet Bureau is to ensure a safe electronic environment for the communication of information and ideas and the transaction of commerce. The lower court's ruling—that libraries and, by extension, other governmental entities may not use Internet-filtering on computers available for public use—threatens this goal. The Court should reverse the lower court's judgment and hold that Internet filtering does not offend the First Amendment. Otherwise, Texas, other states, and individual public libraries will be severely hampered in their efforts to protect children from the effects of Internet pornography and the predators that free, filterless Internet-access will attract to public libraries.

SUMMARY OF THE ARGUMENT

This case presents an important question under the First Amendment. The lower court erroneously held unconstitutional a public library's utilization of Internet filtering software on computer terminals available for public use. *See Am. Library Ass'n, Inc. v. United States*, 201 F.Supp.2d 401, 484 (E.D. Pa. 2002). The purpose of filtering software is to block access to material that is pornographic, indecent, or harmful to minors. Focusing solely on the nature of the Internet and disregarding the setting in which the Internet was accessed, the lower court incorrectly applied strict scrutiny to a library's decision to employ filtering software and held that the decision violated the First Amendment. *See id.* In applying strict scrutiny, the lower court emphasized the *quasi*-traditional-public-forum character of the Internet, ignoring—in neglect of this Court's precedent—the public-library environment where Internet access takes place. *See id.*, at 470.

Forum analysis, however, is inappropriate in this case because libraries' provision of limited Internet access does not create a forum at all. Instead, the decision to limit Internet offerings in the library is a decision about the content of the library's collection and is analogous to the selection of books and other materials. And rational basis—not strict scrutiny—is the appropriate standard to review a library's decisions regarding its print collection. Because print-collection decisions receive only rational-basis review, so should determinations about the portions of the Internet that patrons can—or cannot—access on library computers. Protecting children from sexually-explicit material on the Internet is undoubtedly a rational basis for using Internet filtering software. Therefore, the Court should reverse the lower court's decision.

ARGUMENT

This case presents a challenge to the facial validity of two provisions of the Children's Internet Protection Act (CIPA), under which public libraries that receive federal assistance for Internet access must use filtering software to prevent library patrons from accessing obscene visual depictions, child pornography, and other visual depictions harmful to minors. *See* 20 U.S.C. §9134(f)(1)(A)(i) & (B)(i); 47 U.S.C. §254(h)(6)(B)(i) & (C)(i) (Supp. V 1999).

The lower court analyzed the constitutionality of the two CIPA provisions under the Spending Clause framework that the Court set forth in *South Dakota v. Dole*, 483 U.S. 203, 207-10 (1987). *See Am. Library Ass'n*, 201 F.Supp.2d, at 409, 450-51. In *Dole*, this Court held that Congress may not use its spending power "to induce the States to engage in activities that would themselves be unconstitutional." *Dole*, 483 U.S., at 210. Upon finding that public libraries that comply with CIPA violate the First Amendment rights of their patrons, the lower court concluded that the two challenged CIPA provisions were facially unconstitutional and enjoined their enforcement. *See Am. Library Ass'n*, 201 F.Supp.2d, at 496. That decision was erroneous.

I. CONGRESS—AND STATES—MUST HAVE THE ABILITY TO COMBAT THE SERIOUS PROBLEM OF CHILDREN'S ACCESS TO SEXUALLY-EXPLICIT MATERIAL ON THE INTERNET.

"There is a vast amount of sexually explicit material available via the Internet." *Id.*, at 419. And children are seeing this material because it is easy—and often free—to access. *See id.* There are approximately 100,000 web sites offering free sexually-explicit material on the Internet. *Id.* As one commentator notes, "[t]he great majority of pornographic websites are actually free and serve as 'bait' or 'teasers' meant to lure people into the commercial websites." Mark C. Alexander, *The First Amendment and*

Problems of Political Viability: the Case of Internet Pornography, 25 HARV. J. L. & PUB. POL'Y 977, 982 (2002). In fact, free pornographic websites make up 70 to 80 percent of online pornography. *Id.*, at 982 n.21. Therefore, "children online may have free and unhindered access to almost all of the available adult content on the Internet." *Id.*

The problem that the astounding amount and accessibility of sexually-explicit images online creates is compounded by the ever-increasing number of children who use the Internet. In the United States, an estimated 17 million, or 73 percent, of 12 to 17-year-olds use the Internet. *Id.*, at 980-81. And a growing number of very young children are online as well. *Id.*, at 981. One study concluded that 14 percent of children who use the Internet are five years old or younger. *Id.*, at n.15.

The sexually-explicit material our children are seeing is not limited to text. It ranges from "commonplace pornographic magazine still-frames to interactive sexual encounters." *Id.*, at 982. For example, one site advertised a live broadcast of a young couple losing their virginity together. *Id.* Another site depicted a woman having sex with an animal. DAVID FINKELHOR *ET AL.*, CRIMES AGAINST CHILDREN RESEARCH CENTER, ONLINE VICTIMIZATION: A REPORT ON THE NATION'S YOUTH 15 (2000).

Children inadvertently encounter this material online. Based on interviews with a nationally representative sample of 1,501 young people ages 10 to 17 who used the Internet regularly, the National Center for Missing and Exploited Children and the Crimes Against Children Research Center found that one in four children had experienced an unwanted exposure to indecent pictures in the previous year. FINKELHOR *ET AL.*, ONLINE VICTIMIZATION, at 13. Indeed, accidental exposure to sexually explicit websites is difficult to avoid. *Am. Library Ass'n*, 201 F.Supp.2d., at 419. And unintentional viewing of such material can be harmful to children.

Of the children interviewed who had accidentally accessed pornographic pictures, 23 percent reported that they were "very or extremely upset by the exposure." FINKELHOR *ET AL.*, ONLINE VICTIMIZATION, at 16.

The significant number of children who unintentionally encounter sexually explicit pictures on the Internet is understandable given the innocuous names of many pornographic websites, such as www.whitehouse.com; www.sleepingbeauty.com; www.boys.com; and www.girls.com. *See* Alexander, 25 HARV. J. L. & PUB. POL'Y, at 983; *Am. Library Ass'n*, 201 F.Supp.2d, at 419. On these sites, instead of the President's home or a fairy-tale princess, children see sexually-explicit pictures. *See* Alexander, 25 HARV. J. L. & PUB. POL'Y, at 983; *Am. Library Ass'n*, 201 F.Supp.2d, at 419.

Yet inadvertent exposure is only the beginning of the problem. Children are also intentionally searching out indecent material. The lower court credited a study of Internet use at one library showing that "users between the ages of 11 and 15 accounted for 41% of the filter blocks that occurred on library computers." *Am. Library Ass'n*, 201 F.Supp.2d, at 423. The study concluded that "children and young teens were actively seeking to access sexually explicit images in the library." *Id.*

Furthermore, there can be "secondary" effects to permitting access to pornographic and other harmful Internet material in libraries. Testimony at trial suggested that "unfiltered Internet access had led to occurrences of criminal or otherwise inappropriate conduct by library patrons, such as public masturbation, and harassment of library staff and patrons, sometimes rising to the level of physical assault." *Id.* at 474. There is no doubt that such conduct poses a physical and psychological danger to all library staff and patrons—especially children.

States, as well as the federal and local governments, have a strong interest in protecting children from viewing—in public libraries—the vast amount of sexually explicit material available over the Internet. They have an equally strong interest in protecting children from the secondary effects of the availability of these materials, such as the attraction to libraries or similar public places of persons who might victimize children. *Cf. City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48-49 (1986) (upholding zoning restrictions on adult theaters because such restrictions were aimed at preventing secondary, rather than primary, effects of such theaters). The ability to filter these materials through the use of software is an important weapon in States' and libraries' child-protection arsenals and should not be prohibited.

Congress has already tried—unsuccessfully—to combat Internet pornography by directly regulating Internet content. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997). In contrast to the statute at issue in *Reno*, CIPA does not affect the content of the Internet, but only restricts what patrons can view in public libraries. Thus, Congress's second attempt at addressing the problem of children's access to indecent Internet material is significantly narrower and geared toward passing constitutional muster. If it does not pass, governmental entities and public libraries will be impaired in their efforts to shield children from the harmful effects of Internet pornography.

Simply put, public libraries cannot become places where there is a very real risk that children could be exposed—intentionally or unintentionally—to obscene, pornographic, or otherwise harmful materials. Parents should not be afraid to send their children to the library, either because they might be exposed to such materials or because the library's free, filterless computers might attract people with a propensity to victimize children. Although, at present, filtering may be an imperfect technology, it remains a valuable and

reasonable tool for protecting children, and its use should not be forbidden to public libraries or to governmental entities.

II. RATIONAL BASIS—NOT STRICT SCRUTINY—SHOULD APPLY TO A PUBLIC LIBRARY'S FILTERING OF OBSCENE, INDECENT, OR HARMFUL MATERIAL FROM PUBLICALLY PROVIDED INTERNET ACCESS.

Of the three types of fora recognized in First Amendment jurisprudence—the traditional public forum, the limited or designated public forum, and the nonpublic forum—strict scrutiny applies only in the traditional public forum, which comprises locations such as streets and parks. *See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). Any restriction on speech in a traditional public forum must be narrowly tailored to achieve a compelling governmental interest. *See id.* A limited or designated public forum, on the other hand, may be limited to certain purposes, provided that any restrictions on speech are reasonable with respect to those purposes and provided that the restrictions are viewpoint neutral. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). And, in a nonpublic forum, speech restrictions may be based not only on content but also on "speaker identity" as long as the restrictions are "reasonable in light of the purpose served by the forum" and viewpoint neutral. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983)). Correctly defining the forum is vital because the government's ability to limit speech varies with the nature of the forum. *See Cornelius*, 473 U.S., at 797.

The lower court incorrectly identified the forum in this case, resulting in the erroneous application of strict scrutiny. *See Am. Library Ass'n*, 201 F.Supp.2d, at 470. The lower court likened the Internet to a traditional public forum, stating, "[b]y providing its

patrons with Internet access, public libraries create a forum in which any member of the public may receive speech from anyone around the world who wishes to disseminate information over the Internet." *Id.* In deciding to apply strict scrutiny based solely on the character of the Internet, the court erroneously ignored the context in which the Internet is accessed—in this case, the public library. This Court has recognized that the standard of review for restrictions on speech cannot be determined without reference to the context of the speech. While Internet filtering might properly be subject to strict scrutiny in other settings, it should be judged by a lesser standard when the Internet is accessed at a public library.

Although the lower court determined that a public library is a designated public forum, *see id.*, at 457, it did not apply the "reasonableness" and viewpoint neutrality test necessitated by that forum. Instead, the lower court mistakenly held that publically provided Internet access creates something akin to a traditional public forum within the designated public forum of the library, requiring the application of strict scrutiny. "We are satisfied that when the government provides Internet access in a public library, it has created a designated public forum," *id.*, at 457, but "[i]n providing even filtered Internet access, public libraries create a public forum open to any speaker around the world to communicate with library patrons." *Id.*, at 410; *see id.*, at 466-70 (analogizing the Internet to traditional public fora).

The lower court conceded that a public library's content-based selection of books and other materials for its collection does not trigger strict scrutiny. *See Am. Library Ass'n*, 201 F.Supp.2d, at 462. The court held, nonetheless, that determinations of Internet content offered by public libraries are subject to strict scrutiny. *Id.*, at 463-66. The lower court distinguished the library's print collection from its Internet offerings on the ground that the library does not make individualized judgments regarding the value of web sites it makes available. *Id.*, at 463.

The lower court then held that "under the public forum doctrine," *id.*, at 489, the filtering was not narrowly tailored to meet a compelling governmental interest because material other than that which is pornographic, obscene, or harmful could be blocked. *See id.*, at 470-84, 489. The lower court held that filtering was not narrowly tailored despite evidence that less than one percent of Internet sites were blocked by some filtering software. *See id.*, at 438-39.

By focusing solely on the Internet while ignoring the library environment in which the Internet was accessed, the lower court's decision runs afoul of the Court's admonition that context is *always* a central concern when determining the permissibility of restrictions on speech. *See, e.g., Fed. Communications Comm'n v. Pacifica Found.*, 438 U.S. 726, 746-47 (1978) ("Indeed, we may assume, *arguendo*, that [the George Carlin "filthy words"] monologue would be protected in other contexts. Nonetheless, the constitutional protection accorded to a communication . . . need not be the same in every context.").

Moreover, the lower court's *per se* characterization of the Internet as akin to a traditional public forum—and its rote application of strict scrutiny, despite the library context in which the Internet is accessed—has troubling implications. For instance, under the lower court's analysis, a school's decision to utilize Internet filtering software would be subject to strict scrutiny. It would be immaterial that schools are not considered to be traditional public fora. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390-93 (1993) (school was not a public forum as to after-hours access by various groups). Strict scrutiny would be required solely because of the lower court's view that the Internet should be analyzed, *per se*, in the same way as a traditional public forum, regardless of the context in which it is accessed.

The appropriate level of scrutiny should be decided with reference to the entire context of the speech that is restricted. *See Pacifica*, 438 U.S., at 746-47. Context matters because "[i]t is a characteristic of speech such as this that both its capacity to offend and its 'social value' . . . vary with the circumstances." *Id.* Thus, the public library environment in which the Internet is accessed is of critical importance in determining the proper forum and cannot be ignored.

Even though the lower court erred in conducting forum analysis, the Court need not ascertain the proper forum to decide the issue in this case because forum analysis should not apply at all. By offering limited Internet access, public libraries do not create a forum. Instead, they make a decision about what Internet materials to include in their collections. And rational basis—not strict scrutiny—is the appropriate standard for reviewing public libraries' choice of books and other materials for their collections.

Subjecting public libraries to strict scrutiny for discretionary decisions regarding what information to provide library patrons is inconsistent with the tradition and mission of public libraries. Indeed, an essential role of librarians is to make value decisions to determine library offerings. Also, public libraries—as entities with limited financial resources, limited space, and limited missions—must make decisions that limit information provided to patrons. Determinations as to offerings are therefore an inherent and required obligation of public libraries. *See generally Am. Library Ass'n*, 201 F.Supp.2d, at 421.

Consistent with the necessity of limiting public library offerings and with the responsibility libraries owe to their communities, the vast majority of libraries limit the amount of pornographic material offered to patrons. *See Am. Library Ass'n*, 201 F.Supp.2d, at 420. For example, evidence at trial showed only eight libraries nationwide that subscribed to *Hustler* magazine. *Id.* Because

libraries must continually make discretionary decisions about their collections, limitations on the provision of pornographic material should not be subjected to strict scrutiny.

Applying strict scrutiny to determinations of library offerings conflicts with the traditional and necessary role of librarians to limit their collections. Notably, this Court has never held that forum analysis—much less strict scrutiny—applies to the determination of offerings by public libraries. And there is no reason to treat a library's Internet offerings any differently than its collection of books, videos, CD-ROMs, and magazines.

By connecting a library computer terminal to the Internet, public libraries do not invite broad discussion or publication of materials of all content. Instead, libraries invite discussion of topics that fit their mission of facilitating learning and cultural enrichment. This is apparent from libraries' Internet use policies that, in many instances, broadly restrict permissible uses. For example, libraries frequently prohibit users from checking e-mail or participating in chat rooms. *See id.*, at 422. Some libraries prevent users from using public library computers to play video games or visit on-line dating services. *Id.* Such restrictions reflect public libraries' desire, among other things, to limit Internet use to educational and cultural topics. Although eminently reasonable, such restrictions affect a media that the district court has termed the equivalent of a traditional public forum and are thus subject to strict scrutiny. Under the district court's incorrect interpretation of the First Amendment, therefore, libraries that prevent their computers from being used to play Internet-based video games violate the constitutional rights of their patrons. Such an interpretation would rob libraries of all discretion to impose reasonable restrictions on Internet use.

Other absurd results could also follow from the lower court's analysis. For instance, because no meaningful difference exists

between access to Internet terminals and access to other electronic media, such as cable televisions or even telephones, the strict scrutiny applicable to the Internet could apply to those media as well. Therefore, a public library that provides access to a telephone would be unable to restrict access to 1-900 numbers unless the librarians individually previewed each telephone number that could or could not be accessed. Similarly, a public library that subscribed to cable television but prohibited access to channels that show nudity would be required to justify its decision under strict scrutiny.

Collection decisions of a library should be subject only to rational basis review; therefore, similar decisions about the content of Internet material made available to patrons should also be subject to rational basis review. Protecting children from the vast amount of sexually-explicit material on the Internet is undoubtedly a rational basis for the use of Internet filtering software. Accordingly, the filtering required by CIPA does not offend the First Amendment.

CONCLUSION

The judgment of the lower court should be reversed.

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INTEREST OF AMICI[1]

The National School Boards Association (NSBA), founded in 1940, is a not-for-profit federation of state associations of school boards across the United States. It represents the nation's 95,000 school board members, who, in turn, govern the nation's 14,722 local school districts.

NSBA has a long history of defending local school districts' authority to restrict disruptive, lewd, or offensive speech in school and to determine curriculum content. NSBA filed *amicus* briefs with this Court in both *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), and *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

The Pennsylvania School Boards Association (PSBA), founded in 1895, is a not-for-profit association comprised of nearly all the local and intermediate public school districts in the Commonwealth of Pennsylvania and their school board members. PSBA has a long record of advocacy aimed at preserving the tools educators need to maintain safe school environments, conducive to learning.

In this brief *amici* take no position on the constitutionality of CIPA's filtering requirements as applied to public libraries. *Amici* seek to minimize any spillover effect this case may have on the ability of public schools to continue filtering content on computers within the school environment, *i.e.*, in school libraries and classrooms, if they so choose. *Amici* urge this Court to maintain the crucial distinction between the First Amendment standards that apply to public schools and those that govern other state actors, allowing school boards and administrators greater flexibility and control over the content of expression within the schools to promote educational interests and to protect students.

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[1] *Amici* file this brief with the consent of all parties. No counsel for a party authored this brief in whole or in part. No person or entity, other than the *amici*, their members or their counsel, made a monetary contribution for the preparation or submission of this brief.

STATEMENT OF THE CASE

In response to the proliferation of pervasively vulgar and pornographic materials available on the World Wide Web, Congress enacted the Children's Internet Protection Act (CIPA), Pub. L. 106-544, Div. B, Tit. XVII, 114 Stat. 2763A-335, to protect children from exposure to sexually explicit and other "harmful" materials while accessing the Internet on public library or school computers.

CIPA requires school districts to adopt Internet safety policies and practices as a condition of receiving funds under the Elementary and Secondary Education Act (renamed during reauthorization to *No Child Left Behind*), 20 U.S.C. § 6301 *et seq.*, or "E-rate discounts" under the Telecommunications Act, 47 U.S.C. § 251 *et seq.*. One of the practices, which must be in place as a condition of funding, is the use of filtering devices on computers with Internet access, to block access to obscenity, child pornography and materials which may be harmful to minors. This filtering requirement affects approximately 98% of public schools.

A coalition of public libraries arguing that, despite their best efforts, they would be unable to separate the wheat, *i.e.*, protected speech, from the chaff, *i.e.*, pornographic sites, filed suit on First Amendment grounds challenging the CIPA filtering requirements for public libraries. No challenge was raised to the filtering requirements applicable to public schools. The libraries' argument focused on the inability of current filters to block access to all pornography and obscenity while simultaneously allowing access to all materials protected by the First Amendment.

A three-judge court was empanelled to expedite a decision before July 1, 2002, when public libraries would be required to certify compliance with filtering requirements to receive federal subsidies. The federal district court for the Eastern District of Pennsylvania held that §§ 1712(a)(2) and 1721(b) of CIPA, codified at 20 U.S.C. § 9134(f) and 47 U.S.C. § 254(h)(6) respectively, were facially invalid under the First Amendment. *American Library*

Association v. United States, 201 F. Supp. 2d 401 (E.D. Pa. 2002). It permanently enjoined the federal government from enforcing those sections. The court found that the limitations inherent in the current filtering technology mandated by CIPA would require public libraries attempting to comply with the Act to restrict patrons' access to a substantial amount of protected speech in violation of their First Amendment free speech rights. The court noted that because it was basing its decision on facial invalidity, it would not reach the issues of prior restraint, vagueness, or unconstitutional conditions.

SUMMARY OF THE ARGUMENT

Amici take no position as to the constitutionality of CIPA's filtering requirements as applied to public libraries. This brief is submitted to call attention to the distinction between the First Amendment standards that apply to public schools and those that govern other state actors such as public libraries. This Court has long recognized the need for school boards and administrators to control the content of speech within schools, particularly within the curriculum. In tandem, this Court has recognized a special relationship between students and school officials that in many contexts justifies modification of the constitutional rights extended to students in public schools. *See Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969). In *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985), the Court stated, "we reaffirm that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." In *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), the Court applied this principle to a lewd and offensive speech given by a student at a school assembly. It concluded that it does not necessarily follow "that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school." *Id.* at 682. In essence, the Court has said that the uninhibited and

uncensored exchange of ideas available to adults in public settings may not be available to students in a school setting. These principles mean that even if this Court finds that public libraries may not use the filtering software required by CIPA without violating the Constitution, a similar result is not necessarily true for schools. *Amici* further contend that school officials may choose to use filtering software and other technology protection measures without violating the First Amendment when they do so for legitimate pedagogical reasons. *See Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

ARGUMENT

I. This Court has long recognized that the special governmental function of public schools warrants special constitutional consideration and judicial deference on matters of educational policy.

This Court has explicitly recognized that the educational mission of schools alters constitutional analysis under the First Amendment. Although students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," schools may regulate "speech or action that intrudes upon the work of the schools or the rights of other students." *Tinker*, 393 U.S. at 506, 508. This Court has applied different standards than those imposed on other state actors–standards that permit judicial deference to school officials' decisions on the substance and methodology of education and on matters respecting the health and safety of students entrusted to their care. These standards have been established in the following cases:

- *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (students' free speech rights do not override the authority of school officials to make reasonable pedagogical decisions regarding the content of school newspapers);

- *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (students' free speech rights do not prevent school officials from punishing a student for sexual innuendo in a speech during a school assembly);
- *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (students' right to be free from unreasonable searches must be viewed in the light of school officials' responsibility for health and safety of students);
- *Vernonia School Dist. No. 47J v. Acton*, 515 U.S. 646 (1995) (public school's special responsibility as guardian and tutor of children recognized as the most significant factor in finding suspicionless drug testing of student athletes constitutionally permissible).

At a minimum schools have the authority to curtail student speech if they can reasonably forecast that the speech would cause a "material and substantial disruption" to the school. *Tinker*, 393 U.S. 503. Despite the fact that *Tinker* involved private, political speech by students at school, the Court still held that schools do not have to tolerate private expression that disrupts their educational function. The *Tinker* standard has been more clearly circumscribed by subsequent decisions.

This Court has relied primarily on three standards to determine whether the school can control or limit student expression (or access to information) within the school environment. The standard used depends on the context involved. *Bethel School Dist.*, 478 U.S. 675. The standards are based on the premise that school facilities are by their very nature not public forums and do not become such unless school authorities open them "for indiscriminate use by the general public." *Hazelwood School Dist.*, 484 U.S. at 271 .

School officials have the greatest control over student speech that occurs within the confines of the curriculum and school-sponsored activities. Clearly, the school creates no forum, limited or public, for speech within instructional activities. In *Hazelwood*, this Court found that school officials do not violate the

First Amendment by exercising control over expression that occurs as part of school-sponsored activities as long as "their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273.

No public, or limited public, forum was found in the circumstance of a student delivering a campaign speech in a student assembly, *i.e.*, speech within the school environment but not within instructional activities. *Bethel School Dist.*, 478 U.S. 675. Within the school environment, school officials may regulate speech that is "lewd, indecent or offensive" or "would undermine the school's basic educational mission." *Id.* at 685. As stated there:

> Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. . . . Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the schools." [citations omitted] The determination of what manner of speech in the classroom or in a school assembly is inappropriate properly rests with the school board.

Id. at 683.

Even in the context of school libraries, courts have provided school officials with control, finding neither a public forum, nor a limited public forum. In *Board of Education, Island Trees Free School Dist. No. 26 v. Pico*, 457 U.S. 853 (1982), the Island Trees Board of Education mandated that several books be removed from the school library because they were "anti-American, anti-Christian, anti-Semitic, and just plain filthy." Students brought an action for declaratory and injunctive relief under 42 U.S.C. § 1983, alleging that the board action denied their First Amendment right to receive information. This Court found that students do have some constitutional right to receive information so that schools may not restrict the spectrum of

knowledge merely because certain ideas are controversial or offensive. But the Court reaffirmed that school officials do enjoy broad discretion in setting and selecting the curriculum and in the selection and retention of materials in school libraries. Certainly, school boards are on solid constitutional ground if they exclude materials because they are "pervasively vulgar" or lack "educational suitability." *Campbell v. St. Tammany Parish School Board*, 64 F.3d 184, 189 (5th Cir. 1995).

II. Public schools may constitutionally make filtering and blocking decisions reasonably related to legitimate pedagogical concerns and may block materials deemed vulgar or harmful to students.

A. Internet access is a part of the school curriculum or environment and does not create a public forum within the schools.

Under pressure to improve student achievement, many schools have invested substantial amounts of money in computers, software and wiring classrooms and other school facilities in an effort to harness the great potential of technology to enhance student learning. In 2001, 87% of public school classrooms in the United States were connected to the Internet. This number reflects a jump from 77% in 2000 and no doubt will continue to grow in the next few years, making access to the Internet in school nearly universal.

Schools provide Internet access to students for educational purposes as an important part of the instructional program. In a recent survey, school leaders reported that the Internet is currently used primarily for research purposes in the areas of history/social studies and science, but more than a third believe that at least one in five students will soon receive a substantial portion of their instruction over the Internet. National School Boards Foundation, *Are We There Yet?* (2002), *available at* http://www.nsbf.org/thereyet/fulltext.htm (last visited Jan. 3, 2003).

Because Internet access is offered as a component of a school's academic program and as an instructional resource, it is communication clearly occurring within the confines of the school, not in an open forum for "indiscriminate use by the general public." It is instead an integral part of the formal learning experience that schools offer. Even where schools allow or encourage students to engage in non-assigned reading or to practice their technology skills outside regular classroom projects, these activities are part of the structured learning process over which school boards exercise broad discretion. This discretion includes the right to alter the content of the materials that form the substance of these educational activities. Under these circumstances, access to the Internet on school premises while using school-provided equipment and resources does not create a forum where the school must allow unlimited expression and receipt of ideas. It does not implicate students' personal expression rights established in *Tinker* nor their limited right to receive ideas under *Pico*.

B. The use of filters to block inappropriate materials is within the discretion of school officials.

Along with the incredible growth in the use of the Internet at school has come a huge concern for the safety of children while online. The decision to adopt safety measures has come from public schools' own recognition of their responsibility for student welfare and education and from legal mandates such as CIPA. Nearly all schools with Internet access have taken steps to adopt policies regarding online safety at school. Ninety-six percent of schools include in their policies at least one technology protection measure to control student access to inappropriate materials on the Internet. Some of the most common safety mechanisms include teacher/staff monitoring (91%), blocking or filtering software (87%), written contracts between schools, students and parents (80%), monitoring software (46%), student honor codes (44%) and intranet access only (26%). National Center for

Education Statistics, *Internet Access in U.S. Public Schools and Classrooms: 1994-2001*, (U.S. Department of Education, 2002) *available at* http://nces.ed.gov/pubs2002/internet/8.asp (last visited Jan. 3, 2003).

Since Internet access is a part of the school instructional environment, the appropriate constitutional standards to assess school Internet safety policies and practices are those developed by this Court to determine the extent of regulation school officials may exert over student expression or access to information. This Court has found that within the school environment school authorities have the right to restrict student expression that may be vulgar or harmful, and may restrict student access to information for legitimate pedagogical concerns. In evaluating the constitutionality of Internet safety measures adopted by public schools, it is clear that filtering and blocking decisions need only be reasonably related to legitimate pedagogical concerns, and schools may constitutionally block materials which are deemed to be vulgar or harmful to students.

Schools act both as "guardian and tutor of the children entrusted to [their] care." *Vernonia School Dist.*, 515 U.S. at 665. There is then no doubt that schools have a valid interest in protecting students from the vast amounts of inappropriate and potentially harmful materials available through the Internet. Given the special role of public schools, the First Amendment certainly does not grant speakers whose expression is sexually explicit or pornographic the right to reach students engaged in educational activities at school. *See Ginsberg v. New York*, 390 U.S. 629 (1968) (state statute banning sale of sexually oriented materials to minors upheld).

Schools use filters, either alone or in combination with other safety measures, to reduce the possibility of student access to inappropriate materials either purposefully or inadvertently when using the Internet at school. Educational decisions regarding appropriate materials necessarily involve considerations of students' emotional, physical, psychological and cognitive development. The use of filters is only a mechanical

way of implementing these decisions regarding educational suitability. School officials have the constitutional leeway to make these determinations, which should not be curtailed merely because they have employed a mechanical device in their implementation.

The standards as related to student speech within the school environment require that the use of filters by schools be *reasonably* related to legitimate pedagogical concerns. Because schools are neither traditional nor designated public forums, the adoption of filters does not have to meet the "narrowly tailored" standard that the district court applied to public libraries. The district court's determination that filters are not narrowly tailored to CIPA's purpose of screening out inappropriate sexually explicit material focused on the inherent overblocking and underblocking of current technology.

Amici contend that while overblocking and underblocking of Internet filters may raise practical and pedagogical concerns for schools, this lack of precision does not raise a constitutional bar to their use in schools. A recent report by the National Research Council recognized that "filters can be highly effective in reducing the exposure of minors to inappropriate content if the inability to access large amounts of appropriate material is acceptable." Dick Thornburg and Herbert Lin, eds., *Youth, Pornography and the Internet Executive Summary* at 8 (National Research Council, 2002), *available at* http://books.nap.edu/books/0309082749/html/10.html#pagetop. A recent study by the Kaiser Family Foundation found that on average Internet filters blocked from 87% - 91% of pornographic sites (sites with text or graphic of a sexual act or genitals designed to appeal to prurient interests that was not of an educational or scientific nature). Kaiser Family Foundation, *See No Evil: How Internet Filters Affect the Search for Online Health Information Executive Summary* at 8 (Dec. 12, 2002), *available at* http://www.kff.org/content/2002/3294/Internet_Filtering_exec_summ.pdf. Given that filters can be effective in reducing exposure of children to sexually explicit content, it is reasonable for school boards to decide to use them to

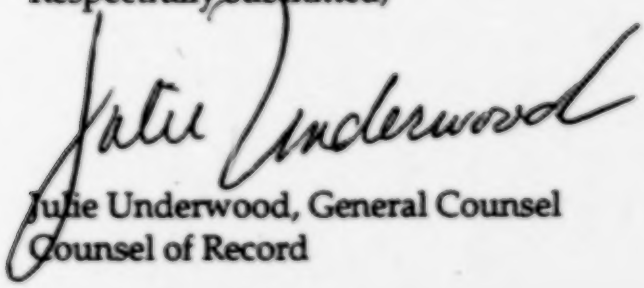
promote legitimate pedagogical concerns, even if filters block "large amounts" of appropriate material.

Where school boards have the flexibility to use filters in concert with other safety measures consistent with their educational philosophies, curriculum and resources, blocking raises no First Amendment concerns. For example, a district might use filters only in elementary grades, or only at student terminals where screens are not easily visible to staff. Others might use filters on all student terminals but select blocking categories or restrictive setting levels based on who would be using the computer and for what purpose. Other districts might choose to reduce overblocking of appropriate materials by disabling filters depending on specific instructional needs, *e.g.*, in advanced biology, health, or medical science classes. *See Comments of National Education Association submitted to the National Telecommunications and Information Administration,* U.S. Department of Commerce in Docket No. 020514121-2121-01, RIN 0660-XX14 (Aug. 27, 2002), *available at* http://www.ntia.doc.gov/ntiahome/ntiageneral/cipacomments/comments/nea/NEA.htm. Given that school officials' actions in the educational context need only be reasonably related to legitimate pedagogical concerns, the availability of less restrictive methods or other educationally-appropriate strategies does not negate the constitutionality of filters. Boards properly have the authority to determine the appropriate balance between Internet safety and the scope of accessibility students have to Internet content. They need not provide access to all information on the Internet that might be deemed educationally appropriate to be reasonably related to pedagogical goals. In exercising their authority boards can choose those safety measures that are reasonably related to their educational goals even if those methods are not the least restrictive in First Amendment terms.

CONCLUSION

Amici urge this Court to make clear that its decision in this case applies only to public libraries and not to public schools. Because of their very distinct governmental functions and institutional missions, libraries and schools might take different approaches to protecting children from inappropriate Internet material. In evaluating the constitutionality of Internet safety measures adopted by public schools, it is clear that filtering and blocking decisions need only be reasonably related to legitimate pedagogical concerns, and schools may constitutionally block materials which are deemed to be vulgar or harmful to students. This Court should continue to apply the special First Amendment standards it has recognized within the school environment.

Respectfully submitted,



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No. 02-361

In The

Supreme Court of the United States

United States of America, et al.,
Appellants,

v.

American Library Association, Inc. et al.,
Appellees,

On Appeal from the United States District Court
for the Eastern District of Connecticut

BRIEF OF AMICUS CURIAE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE[1]

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all the rights enumerated in the Bill of Rights and the 14th Amendment, not just those that might be politically correct for a time or fit a particular ideology. Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese, former Federal Appeals Court Judge Robert Bork, former Reagan White House Policy Advisor Robert Carleson, who also serves as the organization's chairman, former Assistant Attorney General for Civil Rights William Bradford Reynolds, former Harvard University Professor James Q. Wilson, former Ambassador to Costa Rica Curtin Winsor, Jr., former Dean of the Anderson School of Business Management at the University of California at Los Angeles Clayton LaForce, George Mason University Law School Professor Walter Williams, and nationally syndicated columnist Joseph Perkins.

This is precisely the sort of case that is of interest to the ACRU, because we are most concerned about distortions of the correct constitutional analysis because of political correctness.

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[1] Eric Carleson authored this brief for the American Civil Rights Union (ACRU), with assistance from Peter Ferrara. No counsel for any party authored this brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. A motion for leave to file this brief accompanies it. Consent to the filing of this brief has been granted by the parties. Their letters of consent are enclosed with this brief.

SUMMARY OF ARGUMENT

CIPA provides that a library that is otherwise eligible for special federal assistance for Internet access in the form of discount rates for educational purposes under the Telecommunications Act of 1996, and in the form of federal grants under the Library Services and Technology Act, may not receive that assistance unless the library has in place a policy that includes the operation of a "technology protection measure" (i.e. the "blocking" of objectionable Internet websites via filtering software) on Internet-connected computers that protects against access by all persons to "visual depictions" that are "obscene" or "child pornography," and that protects against access by minors to "visual depictions" that are "harmful to minors."

The district court below held that CIPA was unconstitutional on its face in that, by requiring a library to use a "technology protection measure," the federal government would be compelling librarians to make determinations as to what content can or cannot be viewed by library patrons, thereby violating the First Amendment rights of both library patrons and purveyors of non-objectionable content on the Internet whose information might be erroneously "blocked" by libraries. The district court found that libraries create a public forum, protected by the Amendment, when offering Internet services to their patrons; that strict scrutiny therefore applies to the judgments made by libraries as to what Internet materials will be made available to patrons; and that there are less restrictive alternatives available to libraries than filtering software so that patrons may view unobjectionable material while still being protected from objectionable material. Consequently, the district court found the Internet filtering requirements of CIPA to be unconstitutional.

The ACRU joins appellants in contending that CIPA is constitutional in its requirements, that a public forum is not created by the offering of Internet services to public library patrons, that strict scrutiny does not apply to the judgmental processes adapted by libraries in filtering content, and that less restrictive alternatives are not workable and available to libraries in meeting the requirements of CIPA. There is no First Amendment right to federally subsidized access to pornography. Nor, under the First Amendment, should libraries be forced to provide federally subsidized access to pornography.

ARGUMENT

I. The sole issue in the case is whether CIPA is facially invalid because it will induce public libraries, as state actors, to violate the First Amendment of The United States Constitution.

The Children's Internet Protection Act (CIPA) Pub. L. No. 106-554, Div. B, Tit. XVII, 114 Stat. 2763A-335, provides that a library that is otherwise eligible for special federal assistance for Internet access in the form of discount rates for educational purposes under the Telecommunications Act of 1996, 47 USC 254(h) (Supp. V 1999), or grants under the Library Services and Technology Act, 20 USC 9121 et seq, may not receive that assistance unless the library has in place a policy that includes the operation of a "technology protection measure" on Internet-connected computers that protects against access by minors to "visual depictions" that are "obscene" or "child pornography," and that protects against access by minors to "visual depictions" that are "harmful to minors." 47 USC 254(h)(6)(B) and (C) (Supp. V 1999); 20 U.S.C. 9134(f)(1).

The district court below ruled the CIPA unconstitutional on the grounds that it will induce public libraries, as state actors, to violate the First Amendment of the United States Constitution. In so ruling, the court below contends that public libraries using "technology protection measures" that "block" objectionable Internet websites via filtering software, would be making determinations as to what content can or cannot be viewed by library patrons, thereby violating the First Amendment rights of both library patrons and purveyors of non-objectionable content on the Internet whose information might be erroneously blocked by libraries.

The court specifically invalidated two provisions of CIPA. The first provides that a library may not receive E-rate discounts for Internet services unless the library has in place the technology protection software. The second provides that a library may not receive grants to establish Internet access under the Library Services and Technology Act unless the library has in place the technology protection software.

In making its ruling, the district court has nullified the intent of Congress that libraries, in establishing Internet access to the many educational and informative non-objectionable websites and information therein, be able to prevent minor and adult patrons from accessing illegal and harmful pornography on the Internet. This erroneous constitutional ruling, if left unchallenged, will impose a chilling effect upon the ability of public libraries to prevent patrons, including minor patrons, from accessing illegal and harmful pornography on the Internet. Given the ongoing growth and importance of the Internet as an educational and informational tool, it is imperative that reasonable

protections for patrons and libraries alike such as those afforded by CIPA be clearly established as constitutional.

II. CIPA's Filtering Provisions Are Facially Valid.

The CIPA provisions conditioning the receipt of federal funding to libraries upon the use by those libraries of technology protection measures are not unconstitutional, contrary to the ruling of the district court. Congress may not use its spending authority "to induce the States to engage in activities that would themselves be unconstitutional" (*South Dakota v. Dole,* 483 U.S. 203, 210 (1987)). This prohibition does not apply in the instant case, in which libraries which use their editorial judgment via filtering software to prevent access to illegal and harmful pornographic material may, as a permissible matter, access specified federal assistance.

As noted by the government and other parties, librarians who use filtering software as a means to prevent access to pornography are simply invoking their existing right – and professional duty – to keep objectionable material out of libraries patronized by adults and minors alike. As libraries under CIPA voluntarily elect whether or not to seek federal financial assistance for the development of Internet access, CIPA is not an abuse of the spending clause.

Moreover, there is no First Amendment requirement that the federal government help subsidize access to illegal and harmful pornography via the Internet on public library computers, no First Amendment right for federally subsidized access to pornography, and no First Amendment right to force libraries to provide federally subsidized access to pornography.

III. A Library's Use of Filtering Software is Constitutionally Permissible.

In making its ruling, the district court incorrectly and without precedent applied strict scrutiny upon public libraries in their ongoing efforts to determine the quality and nature of materials which are to be made available to patrons, both minor and adult, of those libraries. The court incorrectly held that a public library is a public forum and as such subject to forum analysis. Libraries do not allow patrons to make speeches in their libraries, or to conduct public meetings upon library premises without management approval; the presence of computers with Internet access does not convert the traditionally quiet and contemplative environment of a public library into a public forum. Public libraries are not a public forum subject to forum analysis.

Since long before the invention of the Internet and its introduction into the public library system, librarians have had the freedom and the obligation to determine which books and other materials are to be stocked on library shelves, and to regulate the activity of patrons within a library. Libraries do not make available to their patrons pornographic magazines, XXX pornographic video tapes, or DVDs of similar content. The introduction of computers and the Internet into the public library environment is of no difference to the charge of librarians to ensure that harmful pornographic materials are not readily available to minor or adult patrons.

The ACRU concurs with the government and other parties that available filtering software technology is an effective and constitutional manner of both complying with CIPA and of blocking access to pornography. Such software can and does identify a majority of existing

objectionable Internet sites and new sites as they become known. To the extent that such software might inadvertently block access to non-objectionable material on the Internet, a patron seeking access to such material would have a variety of timely means by which to access such material. The patron could ask a librarian to temporarily "un-block" access to the non-objectionable site. Or, the patron could access the non-objectionable site via an approach from another, unblocked, non-objectionable site.

Conversely, the ostensibly less restrictive alternatives to filtering software suggested by the district court are not workable and available to libraries in order to comply with CIPA. A library policy whereby warnings are posted against accessing pornography on the Internet, or seeking patrons to agree in writing not to do so, with librarians expected to police their patrons accordingly, imposes an undue burden upon librarians that is not balanced by First Amendment concerns. Attempts by librarians to enforce these prohibitions can lead to confrontations or altercations with patrons seeking to access pornography. Requiring librarians to scan "Internet logs" in an effort to determine if pornography has been accessed and the identity of patrons who have done so, would add inappropriate and burdensome job duties to the work of librarians. In addition, other patrons and the librarians themselves may be unduly upset by the viewing of any pornography accessed by a patron which might occur before that patron is stopped from continuing to do so.

Consequently, filtering software is preferable to the ostensibly less-restrictive alternatives sought under strict scrutiny and a public forum analysis, and is, given appellants contention that strict scrutiny does not apply, a constitutional and effective means of complying with CIPA under any circumstances.

CONCLUSION

The ruling of the district court below that CIPA is unconstitutional should be overturned.

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In The
Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL.,

Appellants,

v.

AMERICAN LIBRARY ASSOCIATION, INC., ET AL.

On Appeal From The United States District Court For The Eastern District Of Pennsylvania

BRIEF AMICI CURIAE OF SENATOR TRENT LOTT, CONGRESSMAN CHARLES W. "CHIP" PICKERING, CONGRESSMAN MARK SOUDER, AND CONGRESSMAN ROGER F. WICKER IN SUPPORT OF APPELLANTS

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INTEREST OF AMICI[1]

Amici Curiae are Senator Trent Lott, who represents the State of Mississippi in the United States Senate; Congressman Charles W. "Chip" Pickering, who represents the Third District of Mississippi in the United States House of Representatives; Congressman Mark Souder, who represents the Fourth District of Indiana in the United States House of Representatives; and Congressman Roger F. Wicker, who represents the First District of Mississippi in the United States House of Representatives. All were proponents and/or co-sponsors of the Childrens Internet Protection Act.

As citizens and Members of Congress, Mr. Lott, Mr. Pickering, Mr. Souder, and Mr. Wicker have an abiding interest in ensuring appropriate protection for children, adults, and staff in our public libraries. These members of Congress thus have a strong interest in this case and submit that the Children's Internet Protection Act is a constitutional means to attain that worthy object.

SUMMARY OF ARGUMENT

This case marks with stunning clarity the previously undefined intersection between government regulated Internet access in public libraries and First Amendment jurisprudence. A collision was inevitable, and when it finally occurred in the court below, undifferentiated

[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amici Curiae, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Internet access appears to have been the only survivor. The wooden application of traditional First Amendment law to the extraordinary dynamics and problems presented by patrons who access sexually explicit material via the Internet in public libraries strips government of the ability to protect children and others from the adverse secondary effects of such material. Congress sought to require such protection when it adopted the Children's Internet Protection Act (CIPA), Pub. L. No. 106-554,[2] whose principal object was to prevent the adverse secondary effects that arise from the introduction of material that is obscene, child pornography, or harmful to minors into federally funded public libraries.

It has long been recognized that government may constitutionally protect the public by regulating obscenity, material harmful to minors, and sexually oriented businesses. After the ruling of the court below, however, Congress cannot provide the same protection to its citizens, especially children, in public libraries. First Amendment jurisprudence must be adapted to the realities of technology in the twenty-first century if libraries are to remain places "dedicated to quiet, to knowledge, and to beauty," and if Congress is to be permitted to provide library patrons and staff protection from the adverse secondary effects arising from exposure to sexually explicit material. The ruling of the court below should be reversed.

---

[2] CIPA makes the use of filters by a public library a condition of its receipt of two kinds of subsidies, grants under the Library Services and Technology Act, 20 U.S.C. § 9121 *et seq.* (LSTA), and so-called "E-rate discounts" for Internet access and support under the Telecommunications Act, 47 U.S.C. § 254.

ARGUMENT

This case highlights the difficulties that attend First Amendment questions presented in the context of spectacular, and until recently, unimaginable technological advances that have revolutionized our society. The Internet has become ubiquitous, and with its manifold benefits come significant questions about the right of government to protect its citizens in public places where the Internet is made available. Specifically, the introduction of the Internet has brought with it the introduction into public libraries of material that is obscene, child pornography, and harmful to minors.[3] Library staff and patrons, including children, are now regularly confronted by sexually explicit images, the exhibiting of which in any other public setting is subject to outright prohibition under obscenity statutes, and strict regulation under harmful to minor statutes, public nudity ordinances, and zoning restrictions such as those placed upon sexually oriented businesses. CIPA was designed to ensure that public libraries receiving federal funding provide similar protection to their patrons and staff. See H. Con. Res. 441 (2002) (expressing the sense of

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[3] When an individual logs onto the Internet, he has at his fingertips the largest data base in the world. In addition to literally billions of pages covering every imaginable subject, the Internet also contains millions of pages of material that is obscene, child pornography, and/or harmful to minors. *American Library Ass'n v. United States*, 201 F. Supp.2d 401, 406 (E.D. Pa. 2002) (noting there are more than 100,000 pornographic Web sites that can be accessed for free without providing any registration information). In public libraries, adults, adolescents, and children regularly seek Internet access to hard-core pornography. *Id.* at 405-406, 423. And library staff and patrons are regularly exposed to obscene images left on computer terminal screens. *Id.* at 423.

Congress that CIPA "simply regulates the time, place and manner of speech in a reasonable way").

The unique nature of the Internet and the problems posed by it to public libraries have no real analogue in First Amendment jurisprudence. Prior to the ruling by the court below, decisions about what materials are made available to library patrons rested in the editorial discretion of public libraries. There is no principle of law that can be pressed into service to require, for example, that a library carry Penthouse or other sexually explicit material. There is no constitutional right to require public libraries, paid for by public funds, to provide unrestricted access to sexually explicit material.[4]

The unique characteristics of the Internet, however, as amplified by the lower court's reasoning, remove decision-making authority from libraries and place it directly in the hands of library patrons. *American Library Ass'n*, 201 F. Supp.2d at 464. The fundamental question presented, then, is whether public libraries, merely by providing Internet access, are constitutionally *required* to relinquish all editorial discretion over what is permitted in the library, even when it involves material that is obscene, child pornography, and/or material harmful to minors, simply because current technology does not permit them to exclude such material with mathematical precision. *See Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972)

[4] The constitutional right to receive indecent materials does not correspond to a right of government provision. There is simply no legal basis to assume that government libraries are required to provide pornography to their patrons. Thus, the fundamental presupposition upon which the lower court rested its decision is invalid.

("Condemned to the use of words, we can never expect mathematical certainty from our language.").

I. THE PROBLEM CONGRESS SOUGHT TO ADDRESS WITH CIPA

With CIPA, Congress sought to deal with the widespread problem of sexually explicit images being displayed on computer terminals in public libraries that provide Internet access. Congress determined that preventing access to the images was the most effective way to accomplish the goal of avoiding the adverse secondary effects associated with the viewing of such images by children, non-consenting adults, and library staff. "Less restrictive" alternative measures identified by the court below become operative only after the sexually explicit image appears on the computer screen, the very evil CIPA was designed to avoid.

A. Sexually Explicit Images in Public Libraries.

Sexually explicit material on the Internet is easily accessed using any public search engine, such as Google or AltaVista. *American Library Ass'n*, 201 F. Supp.2d at 419. And although much of the sexually explicit material available on the Web is posted on commercial sites that require viewers to pay in order to gain access to the site, a large number of sexually explicit sites may be accessed for free and without providing any registration information. *Id.* Some Web sites that contain sexually explicit content

seek to lure the unwitting user with innocuous domain names that can be reached accidentally.[5]

Inadvertent access to sexually explicit sites by patrons is just one problem that libraries face. Libraries are also confronted, for example, with situations in which patrons leave sexually explicit images on an Internet terminal so that the next patron will see them when they begin using it, or in which patrons print sexually explicit images from a Web site and leave them at a public printer. *Id.* at 423. A study of the Tacoma Public Library's Internet use logs for the year 2000 (a study credited by the court below) showed that users between the ages of 11 and 15 accounted for 41% of the filter blocks that occurred on library computers. The study concluded that children and young teens were actively seeking to access sexually explicit images in the library. *Id.*

The problem of library patrons surfing the Web for pornography was captured in the testimony of the Chairman of the Board of the Greenville, South Carolina Public Library.[6] In December 1999, there was considerable local

[5] One commonly cited example is http://www.whitehouse.com. Other innocent-sounding URLs that retrieve graphic, sexually explicit depictions include http://www.boys.com, http://www.girls.com, http://www.coffeebeansupply.com, and http://www.BookstoreUSA.com. Moreover, commercial Web sites that contain sexually explicit material often use a technique of attaching pop-up windows to their sites, which open new windows advertising other sexually explicit sites without any prompting by the user. This technique makes it difficult for a user to quickly exit all of the pages containing sexually explicit material, whether he or she initially accessed such material intentionally or not. *Id.* at 419.

[6] The Chairman's testimony is illustrative of other librarians and board members who testified in the trial court below. *Id.* at 423.

press coverage in Greenville concerning adult patrons who routinely used the library to surf the Web for pornography. *Id.* In response to public outcry stemming from the newspaper report, the Trustees held a special board meeting. *Id.* At the meeting, the Trustees learned for the first time of complaints that children were being exposed to pornography that was displayed on the library's Internet terminals. *Id.*

B. Alternative Measures to Filtering Have Been Tried and Have Failed.

The court below identified three "less restrictive" alternatives to filtering to deal with the problem of Internet pornography in libraries. *Id.* at 424. The three alternative measures were (1) channeling patrons' Internet use; (2) separating patrons so that they will not see what other patrons are viewing (this method includes the installation of privacy screens and recessed monitors); and (3) placing Internet terminals in public view and having librarians observe patrons to make sure that they are complying with the library's Internet use policy. *Id.* Significantly, all of the alternative methods suffer significant drawbacks, not the least of which is their failure to prevent patrons from accessing sexually explicit images and the corresponding failure to prevent inadvertent viewing of the images. *Id.* at 424-426. In short, the "alternative" methods are really not alternatives at all because they permit precisely what CIPA seeks to prevent – the display of sexually explicit material on library monitors.

The experience of the Greenville library is illustrative of the failure of the alternative measures to protect against the problem of Internet pornography in libraries. Early in 2000, the Greenville library installed privacy

screens and recessed terminals in an effort to restrict the display of sexually explicit Web sites at the library. Staff were also told that they were to enforce the library's policy prohibiting access to obscenity, child pornography, etc., by means of a "tap on the shoulder." *Id.* at 423-424. The library later removed the privacy screens and reconfigured the location of the computers so that librarians had visual contact with all Internet-accessible terminals, and removed the privacy screens from terminals with Internet access. *Id.* Even after the Board implemented the privacy screens and later the "tap-on-the-shoulder" policy combined with placing terminals in view of librarians, the library experienced a high turnover rate among reference librarians who worked in view of Internet terminals. *Id.* The Board found that the policies it had tried failed to prevent the viewing of sexually explicit materials in the library. *Id.* The Board finally concluded that the methods it had used to regulate Internet use were not sufficient to stem the problems linked to the availability of pornographic materials in the library. *Id.*

Each of the alternative measures identified by the court below fails to accomplish the object intended by CIPA. Unlike filters, which are designed to prevent prohibited content from being imported into the library in order to prevent adverse secondary effects such as the impact on children who are exposed to sexually explicit images, the alternative measures, as a practical matter, become operative only *after* such material is present on the computer monitor, and so can be inadvertently viewed by children, non-consenting adults, and library staff, thereby causing the very harmful secondary effects CIPA was intended to prevent.

II. CIPA IS A CONSTITUTIONAL TIME, PLACE AND MANNER REGULATION INTENDED TO PROTECT LIBRARY PATRONS, STAFF, AND CHILDREN FROM THE ADVERSE SECONDARY EFFECTS OF SEXUALLY EXPLICIT MATERIAL DISPLAYED ON MONITORS IN PUBLIC LIBRARIES.

This Court has observed that a library is "a place dedicated to quiet, to knowledge, and to beauty." *Brown v. Louisiana*, 383 U.S. 131, 142 (1966). CIPA was an unmistakable Congressional effort to preserve and perpetuate this idea in the face of clear evidence that access to the Internet is rapidly transforming public libraries into publicly funded adult bookstores where children, as well as unwitting adults, are exposed to sexually explicit material. The ruling of the court below will, unfortunately, ensure that the noble quiddity of the library will become little more than a faint memory. The court below should therefore be reversed.

A. CIPA Is Not a Content Based Regulation.

CIPA, by its very name, underscores the fact that Congress sought, not to regulate content, but to protect against the adverse secondary effects of children being exposed to sexually explicit material in public libraries, among others. In order to accomplish this goal, CIPA requires that libraries block or filter visual depictions that are obscene, child pornography, or harmful to minors. CIPA, § 1721(b). Transmission of obscenity and child pornography, whether via the Internet or other means, is illegal under federal law both for juveniles and adults and thus has no protection under the First Amendment. *Reno v. ACLU*, 521 U.S. 844, 877 n.44 (1997); *New York v.*

Ferber, 458 U.S. 747, 764 (1982); *Miller v. California*, 413 U.S. 15, 20 (1973); *Roth v. United States*, 354 U.S. 476, 484-485 (1957).

This Court has likewise recognized that states have a compelling interest in protecting the physical and psychological well-being of minors from the harmful effects of sexually explicit material. *See, e.g., Sable Communications v. FCC*, 492 U.S. 115 (1989). In *Ginsberg v. New York*, 390 U.S. 629 (1968), this Court upheld a conviction for selling to a minor magazines which were concededly not "obscene" if shown to adults. Furthermore, it was pointed out in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (plurality opinion), that even members of the Court who accorded the greatest protection to such materials repeatedly indicated that the State could prohibit their distribution or exhibition to juveniles and unconsenting adults. *Id.* at 69. CIPA is intended to prohibit such materials.

There is a dramatic, if not perfect correspondence between the issues raised in this case and those extant in traditional "secondary effects" cases. In *American Mini Theatres*, for instance, a city determined that a concentration of "adult" movie theaters caused an area of the city to deteriorate and become a focus of crime, effects which were not attributable to theaters showing other types of films. This Court upheld the ordinances regulating adult theaters because it was the secondary effects which the zoning ordinances attemped to avoid, not the dissemination of "offensive" speech. *Id.* at 71; *see also Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1985).

Similarly, CIPA is based on Congress' determination that sexually explicit images on a computer terminal in a public library cause adverse secondary effects which are not attributable to other images that might appear on a

computer monitor in a library. It is the adverse secondary effects of the sexually explicit images that CIPA seeks to prohibit, not the dissemination of "offensive" speech. Indeed, CIPA's filter requirement is unaffected by whatever social, political, or philosophical message an image may be intended to communicate; whether an image ridicules or characterizes one point of view or another, the effect of the ordinances is exactly the same. *Cf. American Mini Theatres,* 427 U.S. at 70. Just as the city's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect," *id.* at 71, so Congress' interest in protecting library patrons and in preserving the quality of federally funded libraries must be afforded similar respect.

It is also important that the wisdom of Congress' chosen means to deal with the problem not be questioned. In *American Mini Theatres*, this Court observed, "[i]t is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas. . . . [The] city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Id.* (brackets in original). Congress must also be given a reasonable opportunity to deal with the admittedly serious problem caused by sexually explicit images on the Internet.

B. Delay Is Not Denial, and There Is No Constitutional Right to Be Free From Embarrassment When Checking Out a Book or Requesting Assistance From a Librarian to Unblock a Website.

The lower court went so far as to find constitutionally impermissible CIPA's provisions permitting a patron to request that a site be unblocked. Citing *Lamont v.*

Postmaster General, 381 U.S. 301 (1965) (federal statute which required Postmaster General to halt delivery of communist propaganda unless the addressee affirmatively requested the material held unconstitutional), *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (federal law requiring cable operators to allow access to patently offensive, sexually explicit programming only to those subscribers who requested access in advance and in writing held unconstitutional), and *Fabulous Assocs., Inc. v. Pa. Pub. Util. Comm'n*, 896 F.2d 780 (3d Cir. 1990) (state law requiring telephone users who wish to listen to sexually explicit telephone messages to apply for an access code to receive such messages held unconstitutional), the court below found that "even if [CIPA's] disabling provisions permit public libraries to allow patrons to access speech that is constitutionally protected yet erroneously blocked . . . the requirement that library patrons ask a state actor's permission to access disfavored content violates the First Amendment." *American Library Ass'n*, 201 F. Supp.2d at 486. The cases relied upon by the court below are clearly inapposite, as they have nothing to do with conduct in a public setting that causes adverse secondary effects on others with an equal right to be there; rather, they deal with an individual's right to receive mail, to view pornography in his home, and to listen to sexually explicit messages over the telephone.

Nevertheless, reasoning from those cases, the lower court found CIPA's disabling provisions constitutionally flawed for two reasons. First, the court thought the provisions would deter patrons from asking permission to access constitutionally protected but sensitive information. *Id.* For example, the lower court believed that a patron who was too embarrassed to request assistance from a librarian would suffer constitutional injury as a result. *Id.*

at 487. And second, the lower court found that even where requests could be made anonymously, delay in acting on the request would likewise inflict constitutional injury on the patron. *Id.* at 487-488.

In the absence of any affinity between the cases cited by the lower court and the instant case, it is unclear why the lower court relied on them in reaching its conclusions that delay in access to an Internet site, and deterrence arising from embarrassment in requesting assistance amount to constitutional violations. The most obvious and apropos analogues suggest a different conclusion. Inter-library loans, for example, have never been found to be unconstitutional (as it apparently never occurred to anyone that inter-library loans are unconstitutional), though the patron who is denied access to a desired book because of its unavailability at his library must patiently await its arrival from another library. And if the desired book is of a "sensitive" nature so as to cause embarrassment to the patron who must now request it via an inter-library loan, she must overcome her embarrassment or forgo the desired tome – but she will have suffered no constitutional injury.

The inconveniences of inter-library loans and delayed access to a blocked Internet site, then, are identical in quality (although access to a blocked Internet site may be delayed considerably less than an inter-library loan), only the means of acquisition differs. In each case, delay and potential embarrassment confront the library patron. *The Joy of Sex* in the form of a book carries with it no constitutional right to be free from embarrassment nor a constitutional right to immediate acquisition by adult library patrons; however, if *The Joy of Sex* is available on the Internet but is inadvertently blocked by a public library's

filtering software, there immediately arises, under the lower court's reasoning, a constitutional right for adult library patrons not to be delayed in acquiring it or embarrassed in having to request assistance in acquiring it. Such distinctions defy logic.

As this Court has observed,

> though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate. . . . Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see 'specified Sexual Activities' exhibited in the theaters of our choice.

American Mini Theatres, Inc., 427 U.S. at 70. CIPA is a constitutional time, place and manner regulation intended to address the serious problem occasioned by sexually explicit materials on the Internet in public libraries.

CONCLUSION

Whatever may be the right of a public library patron to receive and view sexually explicit materials, it should not be permitted to trump the right of Congress to impose reasonable restrictions on the use of the Internet in order to protect innocent children and others from the potentially devastating secondary effects of accidentally confronting hardcore pornographic images on a computer screen. CIPA is a valid time, place and manner regulation targeting harmful secondary effects. The lower court should be reversed.

Respectfully submitted,

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In The
Supreme Court of the United States

UNITED STATES OF AMERICA, *ET AL.*,
APPELLANTS,

v.

AMERICAN LIBRARY ASSOCIATION, *ET AL.*,
APPELLEES.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

BRIEF OF *AMICI CURIAE*, NATIONAL LAW CENTER FOR CHILDREN AND FAMILIES, CONCERNED WOMEN FOR AMERICA, NATIONAL COALITION FOR THE PROTECTION OF CHILDREN & FAMILIES, AND CITIZENS FOR COMMUNITY VALUES, IN SUPPORT OF THE UNITED STATES, *ET AL.*, APPELLANTS

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Blaise Cronin, *What a Library Is Not*, Library Journal 15
JAMA, Kaiser Fam. Found., *Does Pornography-Blocking Software Block Access to Health Information on the Internet?* 11-12

INTEREST OF *AMICI CURIAE*

Amici Curiae, the National Law Center for Children and Families, Inc. (*www.NationalLawCenter.org*), Concerned Women for America, Inc. (*www.CWFA.org*), the National Coalition for the Protection of Children & Families, Inc. (*www.NationalCoalition.org*), and Citizens for Community Values, Inc. (*www.CCV.org*), are all non-profit educational and public interest organizations with historically active roles in America's state and federal efforts to enact valid laws regulating obscenity, child pornography, indecency, materials that are harmful to minors or obscene for minors, and to educate public officials, law enforcement officers, and the public on the just and fair enforcement of such laws and on the harmful effects of such materials on society and individual victims.

The unavoidable and overwhelming presence of commercial and public pornography online is a valid subject for technologically assisted restriction under discretionary funding subsidies and your *amici* share the concerns of Congress and the public in defending the necessity and constitutionality of the *Children's Internet Protection Act of 2000* ("CIPA") and hereby present arguments supportive of the Act which may not otherwise be presented to the Court by the parties. Your *amici curiae* submit that the decision below is contrary to the true facts and applicable law and that the findings and intent of Congress support the validity of this Act. [1]

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[1] This Brief of *Amici Curiae* was authored by Kristina A. Bullock, Legal Counsel, and Bruce A. Taylor, President & Chief Counsel, of the National Law Center for Children and Families, and Janet M. LaRue, Chief Counsel, of Concerned Women for America, and no part of the brief was authored by any attorney for a party. No person or entity other than these *amici curiae* or their counsel made any monetary contribution to the preparation or submission of this brief. Rule 37 (6).

CONSENT TO FILE BRIEF

Appellants and Appellees, through their counsel of record respectively, have granted consent to the filing of this Brief of *Amici Curiae* in support of Appellants. Their letters of consent are on file with the Clerk of the Court.

SUMMARY OF ARGUMENT

The *Children's Internet Protection Act* is a reasonable law that effectively addresses Congress' concern about the proliferation of pornography accessed in our public libraries. Filter technology effectively protects library patrons from the vast majority of sexually explicit materials on the Internet.

The District Court committed clear error by basing its decision to overturn CIPA on facts not supported by the record. The court made clearly erroneous findings about CIPA's actual requirements. These factual errors were the foundation for the case's wrongly decided outcome.

The court below incorrectly applied strict scrutiny, analyzing CIPA as though it regulated speech protected by the First Amendment. Nothing in the law justifies such an analysis of the Act's requirement to filter unprotected obscenity and child pornography. The First Amendment only applies to protected expression and CIPA does not regulate protected expression

CIPA's requirement that recipients attempt to filter unprotected forms of obscenity should survive any level of scrutiny. The funding conditions neither remove nor criminalize any speech or materials, illegal or otherwise.

Finally, even if Congress lacked the power to enact the CIPA amendments, the lower court erred by severing the conditions and judicially mandating Congressionally appropriated assistance without the clearly expressed intent of Congress.

ARGUMENT

I. THE TRIAL COURT COMMITTED CLEAR ERROR WHEN IT BASED ITS DECISION ON FACTS NOT SUPPORTED BY THE RECORD.

A. THE RECORD DOES NOT SUPPORT THE DISTRICT COURT'S ERRONEOUS CONCLUSIONS OF LAW; KEY FACTUAL FINDINGS OF THE COURT ARE INACCURATE AND INADEQUATE TO STRIKE AN ACT OF CONGRESS

Amici curiae submit that the lower court made a clearly erroneous finding about what CIPA actually requires. These errors served as the foundation for the trial court's decision and wrongly dictated the outcome of the case.

The court found CIPA requires public libraries to filter virtually all pornography without blocking a substantial amount of protected speech. The court invalidated the Act because filters cannot block all illegal speech without blocking any unprotected speech. "In sum, filtering products are currently unable to block only visual depictions that are obscene, child pornography, or harmful to minors ... while simultaneously allowing access to all protected speech." *American Library Ass'n v. United States,* 201 F.Supp.2d 401, 450 (E.D. Pa. 2002) (Hereafter, "*ALA v. U.S.*").

However, CIPA does not require that <u>all</u> illegal speech <u>must</u> be blocked in order to comply with the law. CIPA only requires libraries to <u>*try*</u> to block only hard-core pornography that the library staff <u>*considers*</u> to be within the scope of the tests for obscenity, child pornography, and, on minors' terminals, pornography that is harmful to minors--and only on those Internet terminals for which it accepts the federal E-rate subsidies-- not on all or any other computers the library

may have.[2] The Act gives libraries discretion in implementing the operations of filters. (In fact, a library desiring to provide unfiltered access could, like anyone else, pay $10-24 per month for Internet access on other terminals.)

By requiring near perfection in filters, the District Court imposed an unreasonable (and impossible) burden on the Act and a burden on libraries that CIPA does not require.

Your *amici* maintain that the *Children's Internet Protection Act* is a constitutionally valid and necessary measure that was enacted to protect against publicly subsidized access to hard-core pornography and child pornography by adults, as well as access by minor children to those two types of pornography, plus soft-core pornography that could be considered obscene for minors ("harmful to minors"), while in public libraries and schools that accept taxpayer support for "E-rate" Internet access.

Congress found this problem to be of enormous proportions. The court below also acknowledged that "the volume of pornography on the Internet is huge...." *ALA v. U.S.*, 201 F.Supp.2d at 406. Yet, the court refused to uphold CIPA and severed the filtering condition from the purse-string, mandating that libraries receive the E-rate subsidies without condition. (*Amici* submit this judicially-created "entitlement" program is outside the power of courts to promulgate. Moreover, others will attempt to apply this rule

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[2] The *Children's Internet Protection Act*, §§ 1712 & 1721, requires Internet protection policies that include filters to protect against access through subsidized library computers to visual depictions that are obscene, child pornography, and harmful to minors, for minors; and obscene and child pornography, for adults. The law does not require that all such visual depictions MUST be blocked or that all terminals use a filter. In addition, § 1732 gives libraries sole discretion about what to filter for those three categories of pornography and to set their filters accordingly. For "E-rate discounts", *see* 47 U.S.C. § 254 (h)(6)(B) & (C).

to school subsidies when those provisions of CIPA are challenged in reliance on the District Court's opinion.)

The action by the trial court to acknowledge the pervasiveness of the pornography problem in public libraries, yet persist in striking down CIPA based on, at worst, an average filter error rate of less than one percent, is clear error and an abuse of discretion.

The findings of the court revealed that using filter technology on public library computers results in less than one percent overblocking of protected speech.[3] Less than one percent is truly minimal compared to the enormous amounts of illegal material that are effectively blocked. This provides an important and substantial amount of protection to our nation's children against harmful exposure to graphic, sexually explicit images on the computer.

Throughout its opinion, the court described the number of wrongly blocked sites as "substantial".[4] We submit that this conclusion is not supported by the evidence. It is an

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[3] Plaintiffs' witness Benjamin Edelman created a list of over 500,000 URLs, which he fed through four filtering programs, resulting in a list of 6,777 URLs that were blocked by the four filters combined. Mr. Edelman forwarded his list of blocked Websites to Prof. Joseph Janes at the University of Washington, who reviewed a small sample of the sites and concluded that between 4,403 and 4,783 sites were, in his opinion, "wrongfully" blocked. *ALA v. U.S.*, 201 F.Supp.2d at 443-45. His own percentage of wrongly blocked (or overblocked) sites was, therefore, between 0.88% and 0.96%, less than one percent, a fact not discussed or noted in the lower court's opinion.

[4] For instance, the court found, without the evidence: "At least tens of thousands of pages of the indexable Web are overblocked by each of the filtering programs...." (emphasis added). *ALA v. U.S.*, at 449. This exaggerates the testimony of Edelman and Janes, who found fewer than 5,000 sites out of about 550,000, or less than 1%, that even they thought "wrongly" blocked.

inaccurate and misleading finding of fact leading to an erroneous conclusion of law. Even the Plaintiffs' witnesses could only find a minimal error rate of less than one percent of sites they thought were erroneously blocked. This record leads to a conclusion that the court relied on flawed evidence to support its basis for invalidating CIPA. This Court should find that Plaintiffs' opinion evidence does not prove "substantial" overbreadth or unconstitutional overbreadth or an unconstitutional prior restraint on the speech itself and reverse the decision below.

While the court incorrectly raised the bar for what it thought library filters must not underblock, (*i.e.* requiring that all illegal speech be blocked), we submit that any underblocking is actually consistent with CIPA. As mentioned above, CIPA aims to protect against three types of illegal pornography, but does not require that all such images be blocked completely for adults or minors.[5] Congress, at least, recognizes the limits of the technologies involved and asked only that libraries and schools use filters to try to block what they think is obscene, child porn, or obscene for minors.

The court also raised the bar for what library filters must not overblock, imposing a false standard that CIPA does not require, and that no filter can meet.

However, *amici* submit that some overblocking of some (arguably or admittedly) protected speech is not inconsistent with the First Amendment for two reasons:

1. The filtering requirement is reasonable. *Amici* submit that it is reasonable to filter access to the huge amount of illegal and harmful Internet pornography on a federally subsidized terminal in a public library, even if a contested number of Websites amounting to less than 1% of potentially relevant material is also temporarily "blocked".

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[5] *Id.*

This is especially so in light of the compelling government interests Congress has addressed in protecting our children and even "consenting adults" from instant and unfettered exposure to adult and child pornography. "[T]he restriction must be 'reasonable in light of the purpose served by the forum'." *Good News Club v. Milford Central School*, 598 U.S. 98, 106 (2001) (citing *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985)).

2. The disabling provision is reasonable. CIPA affords librarians the ability to unblock filter technology for patrons doing bona fide research who have been blocked from a legitimate site that is protected speech. At least when a filter blocks access to a site, the site is disclosed in the list of returned search links (as Edelman & Janes found) and the user knows which sites are blocked and can assess whether to seek access to the site, either from a librarian to unblock the site or at any other time or place by calling up that URL on any non-filtered computer anywhere else in the world. A filter does not affect the site itself; it notifies the user that the site exists but has been found within a blocked category and will not be accessed at this time, place, and manner, but may be accessed by request or at any other time, place, and manner outside the bounds of this filtered terminal. In fact, the embarrassment argument can be seen as disingenuous because there is no evidence for it (other than the lay opinion of librarians that they assumed patrons would be too embarrassed to ask for unfiltered access). If a patron was not too embarrassed to view those sites on a public terminal, they would be no less embarrassed to ask for help.

B. The Factual Findings Of The Court Below Are Not Supported By The Evidence

Amici respectfully submit that there are several critical factual findings made by the court below that are clearly

erroneous and not supported by the evidence, including: 1) that filters block a "substantial" or "huge" amount of protected speech; 2) that filters "substantially" underblock illegal speech; 3) that filter technology is ineffective; 4) that a lack of requests by library patrons to unblock sites means patrons are reluctant or embarrassed to request unblocking of legitimate sites, and 5) that Internet users would receive all available information if it were not for filters.

1. The evidence at trial does not support the court's finding that filters always block "substantial" amounts of speech protected by the First Amendment.

However, this finding that an effective filter will necessarily overblock a "substantial" amount of protected speech is actually countered by Plaintiffs' witness. Mr. Edelman (*see supra* n. 3) used different settings for the different filters and chose to block categories other than just hard-core and child porn for adults and soft-core porn and nudity for minors, as a library would under CIPA, so of course Mr. Edelman blocked more than CIPA requires and more than any library would block using these same filters.[6] Prof. Joseph Janes then examined some of Edelman's blocked sites and concluded that between 4,403 and 4,783 of those blocked sites were wrongly blocked. *See ALA v. U.S.*, at 445. Calculated out, wrongly blocked sites totaled less

[6] Mr. Edelman, Plaintiffs' expert, is a Harvard University student who works as a systems administrator at Harvard Law School. See *ALA v. U.S.*, at 442, n.14. He is also Plaintiff in a suit against N2H2 to try to compel filter companies to disclose their proprietary lists of sites for various categories--from sex to gambling, *etc. Benjamin Edelman v. N2H2, Inc.*, D.Mass. No. C.A. 02-11503-RGS, filed 07/25/02. *See* ACLU press release and link to Complaint, at *http://archive.aclu.org/issues/cyber/Edelman_N2H2_feature.html*

than one percent.[7] In other words, less than one percent of what the filters blocked was assumed by Plaintiffs' experts to be protected speech and therefore erroneously blocked. (Meaning filters had 99% accuracy in correctly blocking.)

Less than one percent "error" rate, in this instance, should not be held "substantial", in the constitutional sense under these circumstances,[8] especially compared to the vast amounts of pornography --hundreds of thousands of illegal porn sites[9]-- that were effectively blocked from access.

The court did not specifically point out the small percentage of overblocking that occurred in the test by Plaintiffs' witnesses. Instead, it focused on large sounding numbers, like how many thousands of URLs were assumed to be erroneously blocked. The court also extrapolated Prof. Janes' findings and concluded, without support in the record, "many times the number of pages that Edelman identified are erroneously blocked by one or more of the filtering programs that he tested." *ALA v. U.S.*, at 445. The court, in essence, substituted its opinion for the facts in the record and committed clear, reversible error.

Amici submit that the court's method of finding overblocked sites was inaccurate and misleading. The court made a finding that all of the studies by Plaintiffs' and

[7] The number of wrongly blocked sites according to Prof. Janes was between 4,403 and 4,783 out of over a half million sites. These critics' best percentage of error is less than one percent.

[8] Even for a criminal law, unconstitutional overbreadth must be not only "real, but substantial as well." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

[9] The court below recognized in its findings "the volume of pornography is huge…" with "more than 100,000 pornographic Web sites that can be accessed for free and without providing any registration information, and tens of thousands of Web sites contain child pornography." *ALA v. U.S.*, at 406.

Government's witnesses[10] "suffer from various methodological flaws." *ALA v. U.S.*, at 437. Nevertheless, the court relied on one "flawed" study to find "substantial" overblocking. Though the court admitted to valid criticisms of their methodology, it still relied on Edelman-Janes to find that a few thousand URLs were erroneously blocked out of over 500,000 sites. *ALA v. U.S.*, at 445. *Amici* submit that the trial court erred in relying solely on this study as the basis for quantifying overblocking.

Finally, the court assumed "huge" overblocking problems with filters, based on apparent limitations in technology. *See ALA v. U.S.*, at 448 (emphasis added):

> [A]lthough software filters provide a relatively cheap and effective, albeit imperfect, means for public libraries to prevent patrons from accessing speech that falls within the filters' category definitions, we find that commercially available filtering programs erroneously block a <u>huge</u> amount of speech that is protected by the First Amendment.

The facts simply do not support this assumption by the court below.

2. The court pointed to apparent limitations in filter technology as evidence of underblocking pornographic material. "These shortcomings necessarily result in significant underblocking." *ALA v. U.S.*, at 448. The court decided that the process by which filtering companies classify sites as pornographic necessarily leads to substantial underblocking. *Id.* at 432.

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[10] The Government presented studies from two expert witnesses and from one librarian fact witness. Plaintiffs presented their testimony against filters through the opinions of their experts, Messrs. Edelman and Janes. *ALA v. U.S.*, at 437-46.

However, the Finnell study[11] concluded that there was less than 1% underblocked. *ALA v. U.S.*, at 440. *Amici* assert that this is not a "significant" underblocking problem. Interestingly, the court chose to disregard Finnell's study of underblocking, because it assumed the patrons knew the filters were on the computers [but only in two of the libraries]. The court made an assumption that patrons "<u>may have</u> refrained from attempting to access sites with sexually explicit materials, or other contents that they knew would probably meet a filtering program's blocked categories." *ALA v. U.S.*, at 440. (This should be a valid deterrent.)

Since filters are not able to perfectly block all pornography without also blocking any protected sites, the court categorically rejected the use of filters as a legitimate means for complying with CIPA. *See ALA v. U.S.*, at 450.

Amici submit that filters are highly effective, despite some over or underblocking. In fact, a recent, independent, scientifically sound, peer reviewed, and unbiased study of institutional filters (of the type used by libraries and schools) proved that filters are at least 87% accurate in blocking access to porn sites. Properly configured to CIPA compliance settings, filters blocked only 1.4% of sexually related health sites. The study was commissioned by the Kaiser Family Foundation, conducted at the University of Michigan Medical School, and reported in the Journal of the American Medical Association.[12] The conclusion was, using

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[11] Government expert witness Corry Finnell studied the Internet logs of public library systems in Tacoma, WA; Westerville, OH; and Greenville, SC. He is an expert on evaluating Internet access logs and developed a reporting tool for N2H2.

[12] *See "Does Pornography-Blocking Software Block Access to Health Information on the Internet?"* JAMA, 12-11-02, Vol. 288, No. 22, p. 2887; abstract is posted at *http://jama.ama-assn.org/issues/v288n22/abs/jtv20005.html* and the full JAMA

"CIPA compliance" settings: "At their least restrictive settings, overblocking of general health information poses a relatively minor impediment."

Finally, *amici* respectfully direct the Court's attention to independent research on the effectiveness of filters, as reported by David Burt, which found:

> "A total of 26 published laboratory tests of filtering software effectiveness have been identified in technology and consumer print publications including PC Magazine, Info World, Network Computing, Internet World, eWeek, and Consumer Reports from 1995-2001. Ten separate software laboratories, such as ZD Net Labs, Consumer Reports Labs, Camden Associates, and IW Labs conducted the tests.
>
> The aggregated results of the independent research indicate that Internet software filters are largely effective, though not perfect, at blocking web sites [emphasis added]."[13]

3. The court acknowledged that "[n]o quantitative evidence was presented comparing the effectiveness of filters and other alternative methods used by libraries to prevent patrons from accessing visual depictions that are obscene, child pornography, or in the case of minors, harmful to minors." *ALA v. U.S.*, at 441. The trial court should have required comparisons of restrictions in library "Acceptable Use" policies to the requirements in CIPA. The court found

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article available from that site. The Kaiser study and database links are available at *http://www.kff.org* from the study page. The JAMA article also recognized the DOJ commissioned study at *http://www.etestinglabs.com/clients/reports/usdoj/usdoj.pdf* that was submitted to the court below.

[13] David Burt, *The Facts on Filters: A Comprehensive Review of 26 Independent Laboratory Tests of the Effectiveness of Internet Filtering Software*, N2H2 (March 2002), available at *http://n2h2.com/pdf/TheFactsOnFilters.pdf*.

"approximately 95% of libraries with public Internet access have some sort of 'acceptable use' policy or 'Internet use' policy governing patrons' use of the Internet. ... These policies vary widely." *ALA v. U.S.*, at 422. The mere existence of use policies has not deterred porn-surfing or sexual misconduct. The record lacks evidence that such policies are enforced, much less effectively enforced.

Factual comparisons of policies versus filters are important in assessing their relative effectiveness. The trial court should have evaluated the kind of "acceptable use" policies in existence, degrees to which they are enforced, whether policy requirements are co-extensive with CIPA's requirements, and whether filters are less restrictive than strictly enforced policies or direct supervision of patrons.

Public libraries have "problems" when relying on "Internet Use" policies without filtering. Greenville County Library adopted a use policy after public outcry over men routinely using the library to get pornography. The policy failed to curb the problems. The court noted, *ALA v. U.S.*, at 424:

> Even after the Board implemented the privacy screens and later the "tap-on-the-shoulder" policy combined with placing terminals in view of librarians, the library experienced a high turnover rate among reference librarians who worked in view of Internet terminals. Finding that the policies that it had tried did not prevent the viewing of sexually explicit materials in the library, the Board at one point considered discontinuing Internet access in the library. The Board finally concluded that the methods that it had used to regulate Internet use were not sufficient to stem the behavioral problems that it thought were linked to the availability of pornographic materials in the library. As a result, it implemented a mandatory filtering policy.

The Greenville Library had success by installing filters on its library computers, stating: "Since installation of the N2H2 Proxy Server in July of 2000, there have been no Internet related incidents involving library security staff, no complaints by the public and only twelve (12) web sites have had to be blocked locally and twelve (12) sites have been unblocked locally."[14]

Next, the court accepted Plaintiffs' unsupported assertion that "because public libraries are public places, incidents involving inappropriate behavior in libraries (sexual and otherwise) existed long before libraries provided access to the Internet." *ALA v. U.S.*, at 424.

In a published report by David Burt, a direct survey of 452 public library systems, with 27% responding, admitted 2,062 problem incidents.[15] *Dangerous Access* disclosed:

> Many of the incidents were highly disturbing, as librarians witnessed adults instructing children in how to find pornography, adults trading in child pornography, and incidents involving both adults and minors engaging in public masturbation at Internet terminals. Analysis of computer logs from just three urban libraries revealed thousands of incidents that

[14] Brief *Amicus Curiae* of Family Research Council in Support of Defendants, filed below in *American Library Ass'n v. United States, et al.* (quoting Greenville County Library, *Greenville County (SC) Library System Case Study for N2H2* (June 2001), available at: *http://www.n2h2.com/pdf/library_case_study.pdf.*)

[15] David Burt, *Dangerous Access 2000 Edition: Uncovering Internet Pornography in America's Libraries*, at 5 (Washington, D.C.: Family Research Council, 2000), available at *http://www.frc.org/get/bl063.cfm*. Mr. Burt, founder of *www.FilteringFacts.org*, was then a librarian at Oswego Public Library in Oregon and is now employed by N2H2 filter company, a provider of industrial grade filter software to schools, libraries, businesses, and public and private institutions.

> went unreported, indicating that the 2,062 incidents represent only a fraction of the total incidents nationwide.
>
> The incidents suggest that Internet policies alone do not deter crime on library Internet stations. The incidents supplied by libraries included 172 incidents where librarians described crimes being committed, such as the accessing of child pornography, the accessing of material described by the librarians as "obscene," public masturbation, and adults exposing children to pornography. In only six of these incidents (3.5 percent) were the police notified.[16]

The court erred in its finding that public libraries have suffered the same extreme misconduct from patrons in the past that they now experience with the advent of unfiltered, unrestricted access to all the pornography on the Internet. No evidence shows past problems as significantly and substantially sexual in nature, or so clearly connected to pornography. This is what Internet porn brought to our libraries.[17]

4. The evidence does not support the lower court's assumption that the lack of unblocking requests in libraries reflects patron embarrassment or reluctance. In fact, the court goes out of its way to invent a reason for the relatively low numbers of requests to unblock sites in several public libraries: "In light of the fact that a substantial amount of overblocking occurs in these very libraries ... we find that the lack of unblocking requests in these libraries does not reflect the effectiveness of the filters, but rather reflects patrons' reluctance to ask librarians to unblock sites." *ALA v. U.S.*, at

[16] *Dangerous Access 2000 Edition*. at 1.

[17] *See* Blaise Cronin, "What a Library Is Not", Library Journal, 11/15/2002; *http://libraryjournal.reviewsnews.com/index.asp?layout=articlePrint&articleID=CA256587*

427. A lack of patron requests to unblock could actually mean that the filters were effective.

The court assumed that some overblocking is to be expected and that, therefore, patrons must have felt too embarrassed or timid to ask for unblocked access. This is not a fact based on evidence.

5. The court made a crucial and central assumption that, without filters, an Internet user would receive all available information that is protected speech. The court did not refer to any evidence to support this.

This assumption, moreover, is not true and everyone knows it. Overlooking this obvious fact of Internet life warrants a remand to show to the world that the "law knows what everyone knows" and will consider all factors leading to an accurate factual conclusion in such an important case.

Search engines that "bring" lists of potential information to Web surfers are actually the first information "filters" that "restrict" access to some sites. The court should have taken notice of the interaction of search and filter technologies and practices and asked the parties to address it in their presentations.

A user who types the same search on two different days will expect to come up with different sets of information, even on the same search engine. Different search engines return different lists of URLs. As the court noted: "Users may find content on the Web using engines that search for requested keywords. In response to a keyword request, a search engine will display a list of Web sites that may contain relevant content and provide links to those sites. Search engines and directories often return a limited number of sites in their search results....." *ALA v. U.S.*, at 417.

An important fact to notice here is that a filter will only block access to sites a search engine has found—and provides a list or record of the sites denied access. When a search engine fails to find a site on a subject, the user never

knows of its existence. CIPA, therefore, can actually facilitate the knowledge of and access to sites by letting Internet users know which sites are returned and allowing the patron to ask for unfiltered or unblocked access at that time or go to another place to call up those known URLs.

The court also went into considerable detail explaining a phenomenon called the "Deep Web" in which not all sites are publicly indexable, or reachable through searches. *ALA v. U.S.*, at 418-19. This is another example of how some protected speech would not come up in an Internet search, even if there is no filter technology operating on the computer. The assumption that all protected speech can be reached, except for the use of filters, is clearly erroneous. This is an important issue that should have been clarified.

The foregoing assumptions and unsupported findings contributed to the court's erroneous finding that filter technology is unable to address the problems targeted by CIPA and that Congress could not require libraries to try using filters in exchange for subsidized Internet access.

II. THE DISTRICT COURT ERRED IN APPLYING FIRST AMENDMENT SCRUTINY TO A CONGRESSIONAL ACT THAT PROHIBITS FEDERAL FUNDING OF UNPROTECTED SPEECH IN PUBLIC LIBRARIES

First Amendment scrutiny is only applicable to protected expression. CIPA by its terms does not regulate protected expression. CIPA requires public library recipients of federal subsidies to use filter technology to block access to illegal pornography lacking constitutional protection.

The District Court, however, analyzed CIPA as if it were a direct regulation of protected speech. The court compounded its error by applying strict-scrutiny to the Act. No First Amendment analysis was warranted by the Act's requirement to filter unprotected obscenity and child

pornography. *See United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 829-30 (2000) (Thomas, J., concurring); *Ashcroft v. ACLU*, ___ U.S. ___, 122 S.Ct. 1700, 1707 (2002) (Thomas, J.); *Ashcroft v. Free Speech Coalition*, ___ U.S. ___, 122 S. Ct. 1389, 1399 (2002) (Kennedy, J.); *Reno v. ACLU*, 521 U.S. 844, 874, 878, n. 44 (1997) (Stevens, J.), and *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978).

In *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 124 (1989), the majority affirmed that strict-scrutiny analysis applies to protected speech, but not to obscenity, which is unprotected, citing *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973).

Appellees make a facial challenge to the Act, which does not regulate any constitutionally protected speech. CIPA conditions receipt of federal funds by recipient libraries on blocking access to three types of pornography lacking constitutional protection. To apply First Amendment scrutiny, much less strict-scrutiny, to materials having no First Amendment protection erases the distinction between protected and unprotected speech. This is especially true when the regulation at issue is an indirect funding regulation that neither criminalizes nor removes any speech from public access, it simply impedes "instant access" in public libraries that accept federal funding and regulations.

Overbreadth analysis is not applicable unless the regulation is aimed at protected speech. The Court in *Massachusetts v. Oakes*, 491 U.S. 576, 584 (1989), held that: "Overbreadth is a judicially created doctrine designed to prevent the chilling of protected expression." *See also Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 508-09 (1985) (O'Connor, J., concurring), that overbreadth analysis should not apply to obscenity laws.

CIPA does not suffer the infirmities found in *Playboy* and *Reno v. ACLU, supra,* because it does not require

recipient libraries to block access to indecency, nor block adult access to material harmful to minors. CIPA is directed at unprotected materials, *i.e.*, obscenity, child pornography, and, for minors, pornography that is harmful to minors. *See Roth v. United States*, 354 U.S. 476, 485-86 (1957); *New York v. Ferber*, 458 U.S. 747, 771, 773-74 (1982); *Ginsberg v. New York*, 390 U.S. 629, 639, 641 (1968).

Even though filters block instant access to some constitutionally protected speech, it is an incidental effect of compliance and is not facially unconstitutional. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 702-07 (1986). CIPA requires protected speech that is "wrongly" or mistakenly blocked to be unblocked. Asking a librarian to unfilter a terminal or a Website is no greater "burden" than requesting a librarian to locate an unfound or wrongly-shelved book.

Likewise, that filters are imperfect is no more a constitutional hurdle than that different juries can reach opposite verdicts in judging whether the same material is obscene in criminal cases, in which concern for constitutional rights is greater. *See Roth v. United States*, 354 U.S. at 491-92; *Hamling v. United States*, 418 U.S. 87, 101 (1973); and *Sable*, *supra*, at 125.

Filters are comparable to expert witnesses who give an opinion as to whether material at issue is illegal, but, like expert witnesses, filters do not have the last word – jurors do. Library officials are the jurors who decide whether or not filters have blocked correctly.

CIPA's mandate to attempt to filter unprotected forms of obscenity should survive any scrutiny. Its time, place, and manner method of restricting access to such materials is also within the rationale applied to intermediate scrutiny, or more properly a rational basis test for such a funding regulation that does not remove or criminalize any speech or materials, illegal or otherwise.

CIPA regulates only the place and time in which illegal pornography may be accessed. It does not prevent or prohibit access to any material other than in public libraries that are recipients of its conditional funding. Any "blocked" sites can be viewed at the same place at a later time by having a librarian unfilter the terminal, or may be accessed at the same time at a different place by using any unfiltered computer outside that library. In either event, the site is known to the patron and no content on that site is removed.

Time, place, and manner zoning restrictions were upheld by the Court in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), because the materials continued to be available to the public. In *American Library Ass'n v. Reno*, 33 F.3d 78, 86 (D.C. Cir. 1994), *cert. denied*, 515 U.S. 1158 (1995), the Court of Appeals noted: "Cases like *Renton* make clear, however, that a 'valid basis for according differential treatment to even a content-defined subclass of proscribable speech [exists when] the subclass happens to be associated with particular 'secondary effects of the speech'."

The adverse secondary effects that Congress sought to avoid by enacting the CIPA are enumerated in the Congressional record on CIPA, Senate Hrgs. 105-214, 105-615, 106-603, S. Rep. Nos. 105-226, 106-141, and further documented at length in testimony and the report on porn and sexual misconduct in libraries entitled *Dangerous Access 2000*, *supra*, H.R. Serial Nos. 106-115, 107-33.

III. CIPA IS A CONSTITUTIONALLY VALID AND REASONABLE ACT AND THE COURT BELOW ERRED IN FAILING TO FIND IT CONSTITUTIONAL

Your *amici* respectfully submit that the trial court erred in finding that CIPA, under strict scrutiny, imposes an unconstitutional burden on accepting federal Internet subsidies. The District Court decided to apply the highest

standard of scrutiny based on its conclusion that Internet use within a public library created a "traditional public forum" within a "limited public forum". In other words, the court agreed that a library is a "limited public forum". It then manipulated the outcome of its forum analysis by creating a rule that Internet use within a library creates its own forum, superceding the context in which it is used. *ALA v. U.S.*, 201 F.Supp.2d at 466. *Amici* submit that conclusion is wrong and assert that the court should have upheld CIPA as valid and reasonable.

This Court explicitly "rejected the view that traditional public forum status extends beyond its historical confines" and state that a "limited public forum" is created by "purposeful governmental action." *Arkansas Ed. Tel. Comm'n v. Forbes*, 523 U.S. 66, 67 (1998). "When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech." *Good News Club v. Milford Central School, supra*, 598 U.S. at 106. The "necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

Amici submit that both access to the Internet terminals, as well as to a library's collections of open-shelf books, or limited access to its archive and research collections, are all subject to restrictions in public libraries as "limited public forums". Libraries have no right, nor duty, to provide any and all available information to patrons. And patrons have no right, nor entitlement, to any and all information, entertainment, services, or Websites of their choosing or that may exist on the Web. Public libraries are government properties that are not "traditional public forums".

The court attempts to liken the Internet in a public library to a "traditional public forum" because "like

sidewalks and parks, [they] are generally open to any member of the public who wishes to receive the speech that these fora facilitate." *ALA v. U.S.*, 201 F.Supp.2d at 466. However, Internet assembly and speech are not "traditional" in the personal sense. Even if the Internet itself were to be considered a separate "public forum", the court erred by ignoring the context within which the information on the Internet is offered. Libraries do not have to give unfettered access to it, any more than it must give access to speeches and rallies inside its four walls. A public library is not a public street, sidewalk or park, and need not invite any form of assembly, debate, or discussion. To the contrary, a library is strictly regulated as a quiet place and has a long-standing tradition as a place to read and think and gather information, then take it elsewhere to make private or public use of it.

In a "limited public forum" the government is permitted to engage in "content discrimination". "The State may be justified 'in reserving [its forum] for certain groups for the discussion of certain topics'. . . [but] the restriction must not discriminate against speech on the basis of viewpoint" *Good News Club, id.* (citing *Rosenberger, supra*) and the restriction must be "reasonable in light of the purpose served by the forum". *Good News Club, id.* (citing *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985)).

Under forum analysis we submit it would have been more appropriate for the courts to apply a rational basis test, because a public library is a "limited public forum", or, at most, an intermediate level of scrutiny. Any overblocking filters may cause in finding Websites would not remove such speech from the Internet or the public domain, but only limit the time, place, and manner it may be viewed.

Even the lower court acknowledged that "generally the First Amendment subjects libraries' content-based decisions about which print materials to acquire for their collections to

only rational review. In making these decisions, public libraries are generally free to adopt collection development criteria that reflect not simply patrons' demand for certain material, but also the library's evaluation of the material's quality."[18] We agree, and assert that the decision a public library makes about what materials it will include in its collection and offer to the public for perusal, regardless of the form the information comes in (*i.e.* books, magazines, microfiche, recordings, or Internet Websites) should be reviewed by the court using rational basis.

The ALA's Code of Ethics for Librarians states: "We significantly influence or control the selection, organization, preservation, and dissemination of information."[19] Plaintiffs contend it is unconstitutional for librarians to control access to information by means of a software filter, yet claim to apply permissible selection criteria when they "significantly influence or control the selection . . . of information".

Librarians and library administrators are afforded a substantial amount of discretion in selecting materials for the library. Although they have to manage their collections in different ways depending on the form of the information, it does not take away the discretion. In choosing books, libraries decide what to order for the library. In offering information and research over the Internet, they must also choose what to offer patrons and what to place in restricted collections or assign limited access privileges.

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[18] *ALA v. U.S.*, 201 F.Supp.2d at 462 (citing Vernard W. Bell, *Filth, Filtering, and the First Amendment: Ruminations on Public Libraries' Use of Internet Filtering Software*, 53 Fe. Com. L.J. 191, 225 (2001) ("Librarians should have the discretion to decide that the library is committed to intellectual inquiry, not to the satisfaction of the full range of human desires.")).

[19] *See http://www.ala.org/alaorg/oif/ethics.html*

Ignoring the clear intent of the Act, the court below distinguished a library's print collection from information accessed on the Internet, based on whether a librarian is able to review and recommend specific information as "particularly valuable." *ALA v. U.S.*, at 462. *Amici* submit the same discretion applies to information offered via the Internet, even though it is a huge storehouse of information wherein each site could never be individually reviewed.

The sheer volume of information on the Internet prevents librarians from professionally assessing each Website before deciding to personally or automatically review or "filter" certain material. This is no different for an Internet filter program than for commercial search engines, which do not and cannot find and offer access to "all" potential sites that could relate to a user's particular (and inherently imperfect) set of search queries. In this regard, search engines (Google, Alta Vista, Excite, *etc.*) and pre-selected directories (Yahoo! and Yahooligans!) are the first line of "filters" that screen out or "block" knowledge of or access to certain sites that may be "out there" on the Web, but undiscovered during such searches.

The District Court did not ascertain the number of sites that library patrons would not discover because a search engine did not find them. The court could not, therefore, make an accurate finding of fact that the patrons would have access to all relevant information on a topic or category – if only a filter had not intervened.

When a filter blocks access to a site, at least the user knows which site is blocked and can get it later. When a search engine does not find sites, they are not on the list of thousands of potential sites the search engine offers and the user never knows about them.

The court found that the types of "restrictions" caused by filter classifications are "content-based restrictions on speech ... clearly subject to strict scrutiny" *ALA v. U.S.*, at

460. The courts should no more command a halt to using search engines because they are imperfect, than they should command a halt to using filtering software. At least administrators can direct filters to screen at certain levels, or block only CIPA's three categories of pornography, using the legal tests as a guide to their discretion.

These *amici* submit that libraries should have the same discretion in deciding what information it will offer their patrons, regardless of what form the information is found. Further, Congress has the power to ask them to exercise that discretion to prevent access to what the libraries themselves and their designated filter providers consider unlawful pornography, especially in exchange for billions of tax dollars for E-rate Internet access. Therefore, the decisions about what material may be accessed on those public library computers that accept the E-rate should not be subject to strict scrutiny, but only rational basis or, at most, intermediate scrutiny, but CIPA should pass under any test.

We submit that CIPA is narrowly tailored to further several compelling interests and that no less restrictive alternatives exist that effectively addresses those interests.

The court said in order to be narrowly tailored, "it is the government's burden, in this case, to show the existence of a filtering technology that both blocks enough speech to qualify as a technology protection measure, for purposes of CIPA, and avoids overblocking a substantial amount of constitutionally protected speech." *ALA v. U.S.*, 201 F.Supp.2d at 477. "[A]ny filter that blocks enough speech to protect against access to visual depictions that are obscene, child pornography, and harmful to minors, will necessarily overblock substantial amounts of speech that does not fall within these categories." *ALA v. U.S.*, at 476-77 [*sic*]. However, the court exaggerated the "substantial" amount of protected speech that may be overblocked, referring to "blocked sites [that] number in at least the

thousands." *ALA v. U.S.*, at 479. Again, the Edelman-Janes analysis relied on by the court only reflected less than one percent overblocking. *See* n. 3, n. 13, *supra*.

Actually, filter technology is sophisticated enough to effectively block most visual depictions of obscenity, child pornography, and harmful to minors material.[20] Some underblocking is consistent with CIPA and does not detract from CIPA being narrowly tailored. The Act does not require that all visual depictions in these categories must be blocked or risk non-compliance with the law.

CIPA gives librarians discretion to try to filter what they think is "obscene, child pornography and harmful to minors". CIPA targets these categories for exclusion from public library Internet access in order to protect children from harmful pornographic images and to reduce the occurrence of illegal dissemination of obscenity and child pornography. Another study at trial indicated that underblocking could be as low as one percent, or less.[21] However, the court chose to use studies purportedly showing higher percentages of blocking (*i.e.* 6-15%),[22] even though the court said all of the studies suffered from "methodological flaws". *ALA v. U.S.*, at 437.

In the case of CIPA, filtering is the "least restrictive means" because it is the *one and only* effective means available to protect children from visual depictions of

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[20] Note the study that reports: "The aggregated results of the independent research indicate that *Internet software filters are largely effective*, (emphasis ours) though not perfect at blocking web sites." David Burt, *The Facts on Filters: A Comprehensive Review of 26 Independent Laboratory Tests of the Effectiveness of Internet Filtering Software*, N2H2 (March 2002), available at *http://n2h2.com/pdf/TheFactsonFilters.pdf*.

[21] *See* study by Cory Finnell, *ALA v. U.S.*, 201 F.Supp.2d at 440.

[22] *Id.*

"obscenity, child pornography, and harmful to minors" material accessed through computers in a public library.

Another governmental interest furthered by the Act through this spending clause condition is that Congress is providing an incentive to Internet development. CIPA would create a market for filter technology that private industry can compete for and fill. Research and development will continue to improve filters to meet the demands of the library and school administrators and Information Technology requirements. This institutional market is the toughest test market that filters could be run through, since they will demand that filters have "least restrictive" settings in order to block only the hard-core of child porn and obscenity and only pornographic materials that could be "harmful to minors". CIPA will actually foster the improvement and management of filter technology that both institutions and private uses will benefit from in the future.

The court discussed some suggested alternatives as "less restrictive" than filtering, including the use of "Internet use policies", recessed monitors, privacy screens, separate viewing areas, or monitoring patrons by placing terminals in visible locations. *ALA v. U.S.*, at 424. However, these unhelpful alternatives are not only ineffective but also create a kind of "sexually oriented business" within the library, fostering harassment, assault, stalking, public masturbation, exposure to disease and harmful exposure to children of graphic sexual images. In light of the seriousness of the problem Congress was trying to address, the lower court's suggestions are completely inadequate. None of these has curbed the huge problem confronting public libraries that offer Internet access to patrons.

A serious problem deserves a serious solution. CIPA provides a real solution to confront this problem. CIPA was carefully drafted so as to be both narrowly tailored and a least restrictive means to accomplish the Government's

compelling interests. We respectfully submit that CIPA survives reasonable review and deserves to be upheld by this honorable Court.

IV. EVEN IF THE CIPA AMENDMENTS WERE UNCONSTITUTIONAL, THIS COURT SHOULD STILL REVERSE THE DECISION OF THE DISTRICT COURT

"In exercising its power to review the constitutionality of a legislative Act, a federal court should act cautiously." *Regan v. Time, Inc.*, 468 U.S. 641, 652-53 (1984). Ruling a statute unconstitutional "frustrates the intent of the elected representatives of the people." *Id.*

The plain language and the Congressional history of CIPA, clearly shows Congress intended to fix an objectionable problem with the Telecommunications Act and Library Services and Technology Act ("LSTA").[23] Indeed, Congress acted expressly *because* the original provisions of these statutes were objectionable, (*i.e.*, since, if unaddressed, the federal assistance could subsidize Internet access to large amounts of illegal hard-core obscenity and child pornography, all inconsistent with the educational purposes behind the statute). *See Children's Internet Protection Act: Hearing on S. 97 Before the Senate Comm. on Commerce, Science and Transportation*, 106th Cong., 1st Sess. (1999). *See also* S. Rep. No. 141, 106th Cong., 1st Sess. 2 (1999), and S. Rep. No. 226, 105th Cong., 2nd Sess. 5 (1998).

Moreover, Congress, in amending the Telecom Act and LSTA, expressly chose to include a "separability" clause covering only the provisions within CIPA (*i.e.*, if a court found any of CIPA's amendments to the Telecom Act or LSTA unconstitutional, that Congress stated its intent to

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[23] Telecommunications Act, "E-rate discounts", 47 U.S.C. § 254; Library Services and Technology Act, 20 U.S.C. § 9101, *et seq*.

effectuate as many of the other CIPA provisions as possible). *See ALA v. U.S.*, 201 F.Supp.2d at 495, n.37 (discussing the separability provisions). Congress could have chosen to promulgate a broader severability clause covering the entire statutes as amended, but it did not.

Amici suggest the reason Congress did not do so was because the evidence before it revealed that federal assistance to libraries was used to access hard-core obscenity and child pornography. Confronted with this problem, the elected representatives of the people chose to address the objectionable situation by refusing to assist such programs unless they implemented a technology protection program.

In deciding whether it may sever an unconstitutional amendment and save the remainder of a statute, a court must look to the intent of the legislature. *Cf. Regan v. Time, Inc.*, 468 U.S. at 653. Although a presumption of severability exists, *Amici* suggests that where it is evident that the Legislature would not have re-enacted the original provisions of the statute, independently of the unconstitutional amendment, the court should not sever just the invalid part since what is left is no longer operative as a law intended by the legislature. *Cf. Regan v. Time, Inc.*, 468 U.S. at 653, citing *Buckley v. Valeo*, 424 U.S. 1, 108-09 (1976) (quoting *Champlin Refining Co. v. Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234 (1932)). Such is the case here.

Through its Congressional history and by its plain language in CIPA, Congress expressed its clear intent that federal assistance under the Telecom. Act's "E-rate discounts" and LSTA no longer should go to libraries for computers and Internet access unless the library had an Internet safety policy that includes filtering illegal pornography.[24] By judicially requiring Congressionally

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[24] "E-rate", Telecom Act, 47 U.S.C. § 254 (h)(6)(B) & (C) LSTA, 20 U.S.C. § 9134 (f)(1)(A)

appropriated assistance to be disbursed without the safety policy, the district court did more than merely find the CIPA amendments to the statute unconstitutional. It, in essence, promulgated a legislative policy from the bench, directly adverse to the clearly expressed policy of the more politically accountable branches of government.

CONCLUSION

For all these reasons, the decision of the District Court should be reversed.

Dated: January 10, 2003 Respectfully submitted,

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DESCRIPTIONS OF *AMICI CURIAE*

The **NATIONAL LAW CENTER FOR CHILDREN AND FAMILIES** (NLC) is a non-profit corporation and educational organization specializing in supporting law enforcement through training, advice, legal research and briefs, and direct trial and appellate assistance to federal, state, and local prosecutors, police agencies, and legislators throughout the United States, in several foreign countries, and United States Senators and Representatives as Members of Congress.

The NLC focuses on constitutional, legislative, trial, law enforcement, and other legal issues related to obscenity, child pornography and sexual abuse, broadcast indecency, Internet and World Wide Web regulations and legal obligations, display and dissemination of materials harmful to minors, prostitution, public nuisances, indecent exposure, and the regulation, licensing, and zoning of sexually oriented businesses. (*www.NationalLawCenter.org*)

NLC and its counsel have filed numerous friend of the court briefs in this Court and in other federal and state cases involving First Amendment issues, including; *Alexander v. United States*, 509 U.S. 544 (1993) (RICO-obscenity, forfeiture); *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996), *cert. denied*, 519 U.S. 820 (1996) (Internet BBS obscenity); *Crawford v. Lungren*, 520 U.S. 1117 (1997) (adult token news racks for harmful to minors pornography); *Reno v. ACLU*, 521 U.S. 844 (1997) (Communications Decency Act, "CDA") *Free Speech Coalition v. Reno*, N.D. Cal. (1997), unpublished, No. C97-028SC, 1997 WL 487758, and Ninth Circuit No. 97-16536, 198 F.3d 1083 (9th Cir. 1999), and *Ashcroft v. Free Speech Coalition*, 122 S.Ct. 1389 (2002) (computerized synthetic child pornography, 18 U.S.C. 2252A), and *Ashcroft v. ACLU*, 122 S.Ct. 1700 (2002) (Child Online Protection Act, "COPA").

CONCERNED WOMEN FOR AMERICA (CWA) is the nation's largest public policy organization for women. CWA is located in Washington, D.C. and provides policy analysis, legislative assistance, and research for pro-family organizations. Its research and publications on the impact of pornography have been distributed to scholars, institutions, organizations, and citizens across the Country. (*www.CWFA.org*)

The issues in this case directly affect the physical, psychological and emotional well being of children, parents and communities throughout the United States.

CWA has filed *amicus curiae* briefs in this Court, *United States of America v. Playboy Entertainment Group, Inc.* (cable indecency), and other federal and state courts on the subject of pornography, including an *amicus* brief in the court below in defense of CIPA, *American Library Ass'n v. U.S.* and *Multnomah County Public Library v. U.S.*, E.D. Pa. Nos. 01-CV-1303, 01-CV-1322.

CWA's Chief Counsel (Co-Counsel herein) has also filed briefs with this Court on the subject of pornography: *Knox v. U.S.* (child pornography); *Crawford v. Lungren* (material harmful to minors); and in other federal and state courts on this subject of pornography: *Crawford v. Lungren* (9th Cir. 1996) (material harmful to minors); *State v. Stoneman* (Oregon Supreme Court 1996)(child pornography); *People v. Wiener* (California Appellate Court 1994) (obscenity).

THE NATIONAL COALITION FOR THE PROTECTION OF CHILDREN & FAMILIES (NCPCF) (formerly known as the National Coalition Against Pornography or "N-CAP") is a national public education and citizen advocate organization that organizes and educates community leaders and works to increase public awareness of the harm caused to the American family by obscene, indecent, and other pornographic and harmful materials. The Coalition is active at local and national levels, both in this country and in countries around the world, in its efforts to educate the public on the harms which illegal, violent, and degrading pornography inflicts upon children and families. (*www.NationalCoalition.org*)

The Coalition has formed local and regional citizen organizations in communities across the Country in order to bring local and national leadership to this important issue and operates a Model Cities America program to foster participation by community, civic, religious, and business leaders to assist public officials and law enforcement efforts to improve and enforce existing laws against unlawful pornography and sexually oriented business activities. Its Chairman is the Reverend Dr. Jerry Kirk and its President is Frederic R. Schatz, M.B.A.

The Coalition is also affiliated with the Religious Alliance Against Pornography ("RAAP"), which is an international organization of church and religious leaders to educate people about the destructive influence of pornography and its offense to public morality, private virtue, and religious principles. The co-chairmen of RAAP are His Eminence William Cardinal Keeler, Archbishop of Baltimore, and the Reverend Dr. Jerry Kirk.

CITIZENS FOR COMMUNITY VALUES (CCV) is a First Amendment, free speech, public policy organization that exists to promote Judeo-Christian moral values and works to reduce destructive behaviors contrary to those values, through education, active community partnering, and empowering individuals at the local, state and national levels. The primary issues that the organization addresses, through citizen and legal actions, are vigorous enforcement of obscenity laws; constitutional regulations, licensing and zoning of sexually oriented businesses; protecting children from harmful sexual materials; and opposing normalization of unhealthy sexual behaviors. (*www.CCV.org*)

CCV has served citizens and families in Greater Cincinnati and the State of Ohio for nearly two decades since its founding in 1983. Our staff and officers work with pro-family, law enforcement, and public policy organizations across the Country. CCV also serves as the Ohio Family Policy Council, which is affiliated with Focus on the Family, of Colorado Springs, an international ministry dedicated to the preservation of traditional values and the institution of the family.

CCV's leadership in fostering and maintaining high community standards in Cincinnati has brought about a constant inquiry from citizens across our Nation who want to know how to achieve the same benefits in their communities. According to U.S. News & World Report, CCV "...has become one of the largest local grassroots organizations of its type in the nation." Because of the consistent local community involvement of its citizens, Greater Cincinnati, the nation's 23rd largest metropolitan area, has the seventh lowest crime rate of the thirty-eight metropolitan areas that have 1.5 million or more residents.

CERTIFICATE OF SERVICE

Three copies of this BRIEF OF *AMICI CURIAE* were served upon the attorneys for the parties by deposit in the U.S. Mails, first-class postage prepaid, on the 10th day of January, 2003, by Byron Adams Printers, addressed to:

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Appellants,

v.

AMERICAN LIBRARY ASSOCIATION, INC., ET AL.

On Appeal From The United States District Court For The Eastern District Of Pennsylvania

BRIEF OF CITIES, MAYORS AND COUNTY COMMISSIONERS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICUS CURIAE*[1]

Amici[2] are cities, mayors and county commissioners committed to providing Internet access in their public libraries to enhance the educational tools and research resources available to library patrons. For *Amici*, this case is about choice. *Amici* desire to retain the ability to choose the type of Internet access they provide their citizens and how they will develop and administer policies regarding the regulation of Internet usage in their libraries. The decision of the district court in this case hinders the ability of all cities and counties across the country to decide the type of Internet access they are willing to subsidize, forcing local government to choose between knowingly providing illegal and child pornography and providing no Internet access at all.

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[1] Appellants and Appellees have consented to the filing of this brief. Consistent with Rule 37.6, this brief has not been authored in whole or in part by counsel for a party. No person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] City of Coppell, Texas; Candy Sheehan, Mayor, City of Coppell, Texas; City of Muskego, Wisconsin; Mark A. Slocomb, Mayor, City of Muskego, Wisconsin; Charlie Roberts, Mayor, Tooele City, Utah; Bruce Barrows, Mayor, City of Cerritos, California; Ross Duckett, Mayor, Mustang, Oklahoma; Joseph O. Seeber, Mayor, Tyler, Texas; Jeff Fisher, County Judge (Head County Commissioner), Van Zandt County, Texas; Robert Speaks, Mayor, Tavares, Florida; Gene Casey, Mayor, Lewisville, Texas; David Lillard, County Commissioner, Shelby County, Tennessee; James W. Coutts, Mayor, City of Cedarburg, Wisconsin; Sharon Emmert, County Commissioner, Smith County, Texas; Jerry Bach, Mayor, City of Wisconsin Rapids, Wisconsin.

SUMMARY OF ARGUMENT

The Children's Internet Protection Act (CIPA), Pub. L. No. 106-554, Div. B, Tit. XVII, 114 Stat. 2763A-335, offers to subsidize filtered Internet access to any local community library. Local cities and communities have the choice. The lower court's decision takes choice away by banning filtering as unconstitutional.

This sweeping decision is based upon a novel right – the right of citizens to compel the government to provide access to particular Internet websites. This right does not exist. *See Board of Ed. v. Pico*, 457 U.S. 853 (1982) (Burger, C.J., dissenting). Congress may pick and choose which information it wishes to subsidize. Citizens have no right to force Congress to subsidize their speech because Congress has chosen to subsidize other speech. *See Rust v. Sullivan*, 500 U.S. 173 (1991).

Library decisions as to what goes into the library are subject to rational basis review, not strict scrutiny. The same speech should not be treated differently because it is a printed, rather than electronic, version. Applying strict scrutiny to library decisions as to what materials come into the library would be disastrous, wresting authority from local communities.

Cities, mayors, county commissioners and other local officials, not courts, should make the decisions about what materials should be in the local library. Local officials are closer to those they represent and can be more responsive and effective in knowing and serving the needs of their community. Cities should not be forced to choose between knowingly providing illegal and child pornography or providing no access at all.

The decision below should be reversed, restoring the authority of neighborhoods, communities and local libraries across the United States.

ARGUMENT

I. CITIZENS HAVE NO CONSTITUTIONAL RIGHT TO COMPEL THE GOVERNMENT TO SUBSIDIZE AND PROVIDE ACCESS TO PARTICULAR INTERNET WEBSITES.

The district court articulated the right at issue in the case as "the specific right of library patrons to access information on the Internet, and the specific right of Web publishers to provide library patrons with information via the Internet." *American Library Ass'n v. United States*, 201 F.Supp.2d 401, 456 (E.D. Pa. 2002), J.S. App. 108a. These two "specific" rights can be condensed into one right: the right of citizens to receive information subsidized by the government. This right forms the basis for the decision. This right, however, does not exist.

This is not a case where the government is singling out any publication for a penalty. This is not a case about Congress imposing a restriction on libraries regarding what materials they may provide their patrons. This is not even a case about Congress attempting to stop the proliferation of child and illegal pornography. This is simply a case about Congress choosing what it will and will not subsidize. No citizen is denied the right to access constitutionally protected material under CIPA.

A. The right does not exist.

The district court's holding rests on a precarious foundation. At the heart of the district court's holding is a novel right: the right of citizens to receive information subsidized by the government. This right is almost identical to the right criticized by Chief Justice Burger in his dissent in *Board of Ed. v. Pico*, 457 U.S. 853 (1982), joined by both Justice Rehnquist and Justice O'Connor. As Chief Justice Burger's dissent aptly pointed out, "[n]ever before today has the Court indicated that the government has an *obligation* to aid a speaker or author in reaching an audience." *Id.* at 888 (1982) (Burger, C.J., dissenting) (emphasis in original).[3] That statement strikes at the very heart of the issue of this case. While the district court artfully crafted a forum analysis to justify enforcing the *obligation* referenced in *Pico*, this case is not a typical forum/free speech case but seeks the recognition of a right forcing the government to provide access to particular Internet sites.

It is not hard to see that "a more pressing constitutional question would arise if government funding resulted in the imposition of a disproportionate burden calculated to drive certain ideas or viewpoints from the marketplace." *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (internal citation omitted). Such a funding scheme, designed to eliminate certain viewpoints from public discourse, is undoubtedly subject to a high level of scrutiny. Such a tactic by the government may easily rise

[3] It is important to note that the plurality in *Pico* did not successfully create such a right with precedential value.

to the level of actual interference with protected activity. But, "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Maher v. Roe*, 432 U.S. 464, 475 (1977). This difference lies at the heart of this case. This case is about state encouragement. In order to transform this case into a case about state interference with a protected activity, there must be a constitutional right being infringed. Under CIPA, websites and websurfers alike are free to disseminate information and access all of the information available on the Internet. There is no interference with the right to disseminate or access information on the Internet. In order for this case to rise to the level of being an interference with a protected right, there must be a right for citizens to receive information subsidized by the government. Yet this "fundamental right" is nowhere to be found.

Chief Justice Burger's dissent in *Pico* further emphasizes the novelty of this "right" by pointing out how ridiculous it would be to hold that the need to have an informed citizenry "would support a constitutional 'right' to have public libraries." *Pico*, 457 U.S. at 888 (Burger, C.J., dissenting). Of course, if there is no constitutional right to have public libraries, as there is not, there can be no constitutional right to have a library provide access to any information at all. The government, recognizing that some content may not be appropriate for a public library, may simply choose "not to be the conduit for that particular information." *Id.* at 889. The district court is attempting to force a judicial override of such a decision by turning a library into a "slavish courier of the material of third parties." *Id.*

B. Congress may freely pick and choose which information it will subsidize without violating a constitutional right.

This is not a case where Congress is singling out publication of particular content for a penalty. *See, e.g., Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987). A mere "refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *Harris v. McRae*, 448 U.S. 297, 317 n. 19 (1980). CIPA does not ban access to any websites, nor does CIPA ban websites from publishing their content. Just as Chief Justice Rehnquist pointed out in his dissenting opinion in *Pico* that the right to receive information is not violated when books are readily available elsewhere, so too is the right to receive information via the Internet not violated when the Internet may be accessed in any number of places, including one's home, one's place of employment or even accessed for free in any number of Internet cafes. *See Pico*, 457 U.S. at 915 (Rehnquist, C.J., dissenting).

Everyone in the world may access all of the content every website has to offer by logging on to the Internet. Congress is in no way restricting the dissemination of information, nor is Congress singling out specific content to be restricted or burdened in the public domain. Thus, there is no "direct external control" of the general availability of any Internet websites. *Id.* at 886 (Burger, C.J., dissenting). Congress simply chose to subsidize filtered Internet access. Congress choosing to subsidize access to some information, but not other information, does not create a penalty for websites or library patrons.

This is not a case where Congress is withholding an independent benefit from a person because that person exercised a constitutionally protected right. *See, e.g.,*

Sherbert v. Verner, 374 U.S. 398 (1963). This is a case about Congress refusing to grant a benefit to a person to finance the person's exercise of a constitutionally protected right, which Congress has the power to do. Under the doctrine of unconstitutional conditions, "the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). In unconstitutional conditions cases, the right and the benefit are separate. *See, e.g., Speiser v. Randall*, 357 U.S. 513 (1958) (the right was free speech, the benefit was a tax exemption); *Rutan v. Republican Party*, 497 U.S. 62 (1990) (the right was freedom of association, the benefit was a job); *Perry v. Sindermann*, 408 U.S. 593 (1972) (the right was free speech, the benefit was a job).

If the right and the benefit are the same, then it is not an "unconstitutional condition" case, but rather resembles *Rust v. Sullivan*, 500 U.S. 173 (1991). In *Rust*, the right in question was the right of doctors and organizations to disseminate information regarding abortion as a legal method of family planning. The benefit at stake was government funding that specifically excluded funding the dissemination of information regarding abortion. The right at stake and the benefit were inseparable. When the right and the benefit are inseparable, the correct inquiry is whether the government is permitted by the Constitution to choose what messages it is willing to subsidize. Conversely, the inquiry is whether citizens have a right to force Congress to subsidize their speech when Congress chooses to subsidize other speech.

While this Court has held "that the government may not deny a benefit to a person because he exercises a constitutional right,"[4] "this Court has never held that Congress must grant a benefit . . . to a person who wishes to exercise a constitutional right." *Regan*, 461 U.S. at 545. No citizen is entitled to have Congress fund their acquisition of information, nor is any publisher entitled to have Congress fund their dissemination of information. Congress may freely pick and choose what messages it will subsidize within the scope of the project it is seeking to fund. *See Rust*, 500 U.S. at 193-94.

It cannot be disputed that Congress is under no obligation to subsidize the exercise of a constitutional right. The district court, however, sought to override this rule by treating Internet access in a library as a constitutional right. Such analysis is flawed. When the government provides books, encyclopedias, dictionaries, reference materials, magazines, newspapers, videos, cassette tapes, compact discs, albums and electronic media to its citizens in a library, the government may pick and choose for what materials it is willing to pay. Even the district court stated that "generally, the First Amendment subjects libraries' content-based decisions about which print materials to acquire for their collections to only rational review." *American Library Ass'n*, 201 F.Supp.2d at 462, J.S. App. 120a. Clearly, the government may subsidize access to

[4] *Regan, Secretary of the Treasury v. Taxation with Representation of Washington*, 461 U.S. 540, 545 (1983) (*citing Perry v. Sindermann*, 408 U.S. 593, 597 (1972)); *see also Speiser v. Randall*, 357 U.S. 513 (1958).

whatever information it rationally chooses to provide to its citizens.

As drafted, CIPA "does not attempt to suppress the communication of ideas." *New York v. Ferber*, 458 U.S. 747, 775 (1982) (O'Connor, J., dissenting). There is no requirement for Congress to take an all-or-nothing approach to the decision of whether to subsidize Internet access to all materials on the Internet or subsidize nothing. All-or-nothing approaches to First Amendment jurisprudence are generally disfavored. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 401 (1992) (White, J., concurring) (O'Connor, J. and Blackmun, J., joining). To say that Congress, once it chooses to subsidize Internet access, *must* subsidize access to the entire Internet ignores the Court's holding in *Rust*. *See Rust*, 500 U.S. at 193.

C. Congress defined the scope of its subsidization project as providing filtered Internet access.

The government, just because it provides a vast array of information within its library system, does not suddenly lose the ability to define the scope of the project it is continuing to fund or subsidize. Otherwise, a library that provides hundreds of thousands of books, with such a wide variety of content and viewpoints, would suddenly find itself facing higher and higher levels of scrutiny and without the ability to continue to define the scope of information it is willing to purchase or subsidize for its citizens. The district court held that the government loses its ability to define exactly what messages and content it is willing to subsidize when the amount of information it is willing to subsidize grows too large. *See American Library Ass'n*, 201 F.Supp.2d at 460, J.S. App. 115a. Such a holding

blatantly ignores Congress' authority to define the scope of messages it is willing to subsidize.

The scope of the project is the key to this entire case. Congress is free to define the scope of the project it is funding; Congress is free to "fund one activity to the exclusion of others." *Rust*, 500 U.S. at 193. Congress is free to choose not to fund activities beyond the scope of its project. *See id.* at 194. Like in *Rust*, this is "a case of the Government refusing to fund activities, including *speech*, which are specifically excluded from the scope of the project funded." *Id.* at 195 (emphasis added). If Congress desires to only fund speech that meets a certain category, without funding other speech, it may do so while defining the category of funded speech as narrowly or as broadly as it would like. Therefore, the essential question to be addressed in this case is: what is the scope of the project?

Under CIPA, the scope of the project was to subsidize *filtered* Internet access. Of course Congress understood that filtering technology is not perfect. It can be assumed without question that Congress knew that filtering Internet access would undoubtedly lead to the blocking of websites containing valid educational materials. However, Congress simply chose, in light of these obvious circumstances, to limit the scope of its subsidization of Internet access to only *filtered* access. Congress may have restricted the scope of its subsidization of Internet access only to websites that end with dot-org or dot-gov or any other limited set of websites. Such a decision by Congress would not offend the First Amendment because Congress is free to choose for what information it will subsidize access.

Congress is free to "make a value judgment" favoring a particular type of Internet access over another type of Internet access and "implement that judgment by the allocation of public funds." *Maher v. Roe*, 432 U.S. 464, 474 (1977). Congress made a value judgment that filtered Internet access was more beneficial for the general welfare than unfiltered Internet access. It does not matter whether the filtering program is perfect or flawed. It does not matter if the filtering program blocks hundreds or even millions of websites that contain educational speech. As long as Congress is paying for the Internet access, Congress can choose the category of information to which it is willing to subsidize access. Congress chose filtered Internet access. Therefore, Congress may implement its judgment by only funding filtered Internet access. If the library wants unfiltered Internet access, the library can simply choose not to participate in Congress' subsidization program.

Congress' solution to the proliferation of child and illegal pornography on the Internet does not have to be perfect. Congress does not have to wait until there is a filtering program available that blocks all information harmful to minors, obscenity and child pornography while never blocking a single website containing constitutionally protected speech.[5] "A statute is not invalid under the

[5] It is not difficult to imagine that even if technology was available that would perfectly filter Internet access to the satisfaction of the district court in this case, some plaintiffs would invoke the argument that such filtering is not good enough because it is too broad. They might argue that it is necessary to have filtering programs that filter each word on each individual page such that even a child pornography webpage could be accessed, with only the very specific offending words

(Continued on following page)

Constitution because it might have gone farther than it did, or because it may not succeed in bringing about the result that it tends to produce." *Roschen v. Ward*, 279 U.S. 337, 339 (1929). CIPA is not a perfect solution, but it is a solution well within the power of Congress to create.

Plaintiffs have ample access to the more complete Internet access they seek. There is, however, no constitutional right to force municipalities and other local governments to subsidize their Internet desires. Such a new "right" would, in fact, dramatically weaken the authority of municipalities and locally elected officials over their libraries.

II. MUNICIPALITIES CANNOT EFFECTIVELY FUND AND PROVIDE LIBRARIES TO THEIR CITIZENS IF STRICT SCRUTINY IS TO BE APPLIED TO THEIR DECISIONS OVER WHAT GOES INTO THE LIBRARY.

The district court was careful to point out that the right at issue was not whether there is a "First Amendment right to compel public libraries to acquire certain books or magazines for their print collections." *American Library Ass'n*, 201 F.Supp.2d at 456, J.S. App. 108a. The court even stated that the First Amendment subjects libraries' content-based decisions about which print materials to acquire for their collections to only rational review." *Id.* at 462, J.S. App. 120a. We agree. The district

and parts of the pictures blacked out, leaving all of the "constitutionally protected speech" on the page untouched. The picture of the child's face would be viewable, for example, with only the clear offending content of the photograph blacked out.

court, however, applied strict scrutiny to information acquired by the library via the Internet.

A. There is no distinction between printed speech and speech on the Internet.

The district court pointed out that the Internet is open to anyone that wishes to be a town crier. Yet, this is true of letters to the editor sections of magazines and newspapers. Without question, newspapers receive a considerable amount of protection and enjoy a vast expanse of freedom to print what they choose to print.[6] If the library may pick and choose which newspapers and magazines to which it will subscribe with only rational basis review, then it is baffling why a library may not pick and choose which electronic messages it is willing to allow to pass through its front door without extreme judicial oversight under strict scrutiny.

There seems to be some confusion regarding the operation of the Internet that caused the district court to apply a completely different standard of judicial review to the Internet than it would to printed material. There is a sense from the district court's opinion that the fact that anyone may publish a website, publish information on message boards and engage in endless chat room conversations on an immeasurable number of topics somehow

[6] *Lovell v. Griffin*, 303 U.S. 444, 452 (1938) ("The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty from every sort of infringement need not be repeated.").

distinguishes the Internet from the print media. Such a conclusion ignores the obvious.

On the Internet, message boards have moderators, which act as censors blocking any speech that is deemed inappropriate for the message board. Thus, on a sports-related message board, a discussion of politics will be deleted by the moderator. This is exactly what happens in the print media. A discussion of politics in a letter to the editor for *Sports Illustrated* would not be published. On the other hand, there may be a political publication that would not print a letter to the editor or an article related to sports. Some websites ban profanity and pornography while other websites promote such things, just as some magazines and books contain no profanity or pornography by design and some magazines and books promote profanity and pornography as their main topics. In addition, any person may start a publication, newsletter, or write a book that could eventually make its way to the library, much the same way any person may create a website and publish information.

If a library, as the district court admits, may use any rational criteria for choosing to stock some printed materials rather than others, a library should also be able to pick and choose which electronic materials it is willing to stock for its patrons with the same standard of review. Thus, if the library wants to stock *Sports Illustrated* but chooses not to stock other publications, a court will not inquire into that decision any deeper than to assess whether the library could have had any rational reason for excluding

Time, *Hustler*, *Playboy*, the *NAMBLA Bulletin*[7] or any other publication.

The world of printed speech is extremely vast. There are millions of publications available for a library to choose when determining what materials it would like to make available to its patrons. The library, for any rational reason, may choose to acquire some materials for its patrons, but not other materials. Some of these decisions may be based on a value judgment; some of these decisions may be based on economic considerations. Libraries enjoy the right to exclude a vast number of speakers from their collections without significant judicial inquiry. To apply strict scrutiny to the exclusion of the very same speakers because they are speaking through an electronic forum is absurd.

Under the lower court's rationale, if a library chose not to subscribe to the *NAMBLA Bulletin*, which a library could do for any number of rational reasons, that same library would be unable to filter the electronic version of that same publication on the Internet without facing heightened judicial scrutiny. Yet, the exclusion is for the very same publication. The district court failed to adequately explain why the electronic version of a publication deserves greater protection than the printed version. Such a distinction does nothing more than trivialize the First Amendment by creating a meaningless distinction for speech in an electronic format.

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[7] The *NAMBLA Bulletin* is the official publication of the North American Man/Boy Love Association.

B. The prior review distinction drawn by the district court between printed materials and electronic materials on the Internet is invalid.

The lower court theorized that library content-based restrictions on their materials other than the Internet are not subject to strict scrutiny because the library exercises "editorial discretion."[8] This assumes the library reviews all materials before it provides them to the public. It is unreasonable to believe that any library reads an entire encyclopedia set before placing it on the shelf. Thus, the very foundation of this distinction is invalid.

Libraries, and indeed the municipalities that principally fund libraries, do not review all print materials that enter their libraries. Such a task would be daunting on an unparalleled scale. The city of Cerritos, California,[9] for example, receives 30,000 new books, CD-ROMs, DVDs, books on tape and books on compact disc every year, not including numerous magazine and newspaper subscriptions. Yet, the city only employs twenty-two full-time and five half-time librarians. It is not only preposterous to suggest that the limited library staff reviews all 30,000 individual materials brought into the library each year, it is physically impossible to do so.

Librarians must field numerous requests for help finding materials, check-out books for patrons, re-stock library shelves, catalogue and shelve new materials,

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[8] *American Library Ass'n*, 201 F.Supp.2d at 464, J.S. App. 125a.

[9] *Amicus* Mayor Bruce Barrows is the mayor of the City of Cerritos, California.

collect late fees, organize activities for children, conduct library tours, coordinate the use of library space by outside groups, assist patrons with Internet access and process library card applications. Even if all twenty-seven Cerritos librarians spent every working hour reviewing materials without ever attempting to fulfill their mission of actually running the library, they still could not give even a cursory review of all 30,000 materials each year. Libraries absolutely do not review all tangible materials before they are placed for use by the public. In many cases, the libraries and municipalities that fund and run them rely on other peoples' opinions or simply do not know the content of many materials on the shelves. The prior review distinction attempted for suddenly applying strict scrutiny to subsidized Internet access is untenable.

C. Lessening governmental prior review of private speech should lessen, not raise, the standard of scrutiny.

The more government involves itself in making decisions regarding what speech will be allowed and what speech will not be allowed, the more judicial scrutiny is heightened. When prior review by the government is required before speech may be freely disseminated, there is a concern that a byproduct of such prior review is a chilling effect on speech. A court should view prior review, just like prior restraint, with much skepticism; "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). It is surprising that the lower court would reason that when libraries engage in prior review, they are subject to only rational basis, but when they do not engage

in prior review on the Internet, they are subject to strict scrutiny.

The court was correct in the first part of its analysis – libraries make content-based decisions on which materials come into their doors everyday. These decisions are not subject to strict scrutiny, or libraries could not function and would be subject to a litigation frenzy. Applying a stricter scrutiny to government decisions because there is less *government* editorial and prior review of materials makes no sense.

III. MUNICIPALITIES AND LOCAL COMMUNITIES, NOT COURTS, SHOULD MAKE THE DECISIONS ABOUT WHAT MATERIALS SHOULD BE IN THEIR LOCAL LIBRARIES.

This is not a case about whether Congress may impose a filtering requirement, but is a case about whether municipalities have the choice to impose a filtering requirement on the Internet access they provide through their public libraries. The decision below, if affirmed, will bar all municipalities and other local officials from filtering in their libraries.

A. This case is an attempt by libraries to use courts to override the local authority of municipalities that create, fund, and set policy for the libraries.

The library does not enjoy total autonomy in making decisions. The local governments of municipalities have the power to create criteria used by the libraries for certain decisions a library makes, including criteria used for the acquisition of materials for the library's collection.

Municipalities want to retain the right to choose the criteria their libraries will use in assessing *all* material made available to library patrons. The district court effectively took that right away by declaring Internet access in a public library to be a public forum where governmental regulation is viewed under strict scrutiny by our courts.

Chief Justice Burger's dissent in *Pico* warned of the court becoming a "super censor," interfering with local control of a school library. *Pico*, 457 U.S. at 885 (Burger, C.J., dissenting). Such a warning must be heeded in the present case. Libraries are built, staffed and filled with materials because local communities, through their elected representatives, choose to spend their tax dollars on such an endeavor. The libraries are built and maintained for the community, by the community. Their very existence is local in nature. The district court's decision strikes at the very heart of this traditionally local endeavor by wresting control away from local municipalities and appointing courts as "super censors" of local decisions concerning whether to knowingly provide child pornography, obscenity and materials harmful to minors.

This case is anomalous to say the least. The library plaintiffs in this case ask this Court to rule that *they* are in violation of the Constitution if they filter. This bizarre claim is all the more puzzling since the libraries seek an opinion limiting their freedom to make decisions regarding what materials they are willing to provide their patrons. Such a tactic suggests that these plaintiff libraries and library associations are attempting to use this case and use the Court to advance their views and agenda on the unwilling populace and local governments who have authority over them.

Municipalities have the ultimate control and final say of library policy. Officials, elected by the citizens of their local community, make decisions regarding library policy and what materials they are willing to provide their citizens. If citizens are unhappy with their decisions, such as the decision to filter Internet access in the library, the citizens are free to choose another leader or set of leaders through the democratic process. The library associations and library plaintiffs in this case are seeking to circumvent this democratic process and insert the Court as a barrier between them and the municipalities that govern them.

If this were not the case, then the libraries and library associations that are plaintiffs in this case would not have claimed that CIPA's filtering requirement is an unconstitutional condition. If it is unconstitutional for the federal government to subsidize filtering, then it also becomes unconstitutional for the municipality to require filtering. The opinion below strikes at the very heart of local control and the authority of local citizens and their representative government.

B. Many Municipalities will choose to stop providing Internet access if forced to provide unfiltered Internet access.

As stated by this Court on a number of occasions, it is the goal of the First Amendment "to secure the widest possible dissemination of information." *Buckley v. Valeo*, 421 U.S. 1, 49 (1976) (internal citations omitted). At first blush, it may seem to be the case that this noble goal is achieved by affirming the district court's opinion. However, that is not the case. If this Court affirms the district court's opinion, it will reduce Internet access in many

communities. Many mayors, county commissioners and municipalities, including the ones represented in this brief, will provide no Internet access at all rather than provide unfiltered Internet access that includes child pornography and obscenity.

Amicus City of Muskego, Wisconsin, for example, is adamant that should it lose the ability to filter out child pornography, it would immediately stop funding the T-1 line, resulting in all thirty computer stations in its library losing their connection to the Internet. The City of Tyler, Texas,[10] when it first decided to provide Internet access, did so on the condition that it would stop immediately if filtering was ever stopped. All of the mayors, county commissioners and cities represented in this brief would immediately move to shut down Internet access if the lower court's decision were affirmed.

A decision that only unfiltered access is allowed would eliminate the choice of what type of Internet access a municipality could provide. The district court seemed to be motivated by the concept that filtering Internet access somehow restricted the free flow of information. Considering that the free flow of information is a positive aspect of a free society, it is important to promote the widest dissemination of ideas and information as possible. Increasing the number of choices for municipalities with regard to the type of Internet access they provide in their libraries is consonant with this aspiration. If the Court chooses to ban filtering as a tool for governmental entities to use to keep

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[10] *Amicus* Mayor Joseph O. Seeber is the mayor of the City of Tyler, Texas.

child pornography and obscenity out of the public library, then many municipalities will be left with no choice but to take drastic steps to choke off *all* electronic discourse in the public library.

It is the responsibility and power of local governments to choose the approach most effective in protecting their communities, not one district court solution mandating an approach for the whole country. If a group of plaintiffs asserting a new right to government subsidized access to Internet sites can strip a city of its ability to keep itself from promoting child pornography, then representative local government is weakened, whereby libraries, by filing a lawsuit in a court, can usurp the very city that gave birth to it in the first place. Municipalities will be left with no other alternative but to shut off access or choose to knowingly provide access to child pornography, material harmful to minors and obscenity. Many, including *amici*, will choose to shut off access.

IV. THERE ARE NUMEROUS RATIONAL BASES FOR KEEPING PORNOGRAPHY OUT OF THE PUBLIC LIBRARIES.

Local communities have many rational bases for filtering. Research has uncovered that "child molesters often use pornography to seduce their prey, to lower the inhibitions of the victim, and to serve as an instruction manual."[11] Seventy-seven percent of convicted child

[11] Marshall, W.L., Ph.D., *Pornography and Sexual Offenders*, *in* PORNOGRAPHY: RESEARCH ADVANCES AND POLICY CONSIDERATIONS 189 (D. Zillmann & J. Bryant eds., 1989); Dr. Marshall's Curriculum Vitae is available at http://www.rockwoodpsyc.com/cv-bill.html.

molesters that molested boys and eighty-seven percent of convicted child molesters that molested girls in one study *admitted* to the regular use of hard-core pornography, material readily available on the Internet with no filtering system.[12] Many cities and communities desire to protect the children of their communities by choosing not to pay for the tools of the trade for child molesters. Their communities may consider providing free Internet access to child and other illegal pornography to be indistinguishable from actually promoting such criminal activity. A ruling that strips the right of local government to choose not to subsidize such criminal and extremely dangerous behavior would endanger millions of children since the local government, the bastion of law and order in every community, would be unable to choose its most effective means to protect its citizens.[13]

Many cities will act because innocent children are targeted by obscene pornographic websites that seek to expose themselves to unwitting children who are attempting to use the Internet for legitimate educational research. A child that is seeking to log on to www.whitehouse.**gov**, the official White House website, in order to view a video

[12] MARSHALL, W.L., PH.D., A REPORT ON THE USE OF PORNOGRAPHY BY SEXUAL OFFENDERS (Ottawa, Canada, Federal Department of Justice, 1983).

[13] While Appellees offer other approaches, such as a "tap on the shoulder," the government need not negate the effectiveness of other solutions. *See Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001) (internal citation omitted) ("Where rational-basis scrutiny applies, the State need not articulate its reasoning at the moment a particular decision is made. Rather, the burden is upon the challenging party to negate any reasonably conceivable state of facts that could provide a rational basis for the regulation.").

of Barney, the President's dog, romping around the White House, is in for an extremely vulgar surprise if she instead types www.whitehouse.**com**, which is a hard-core pornographic website extremely harmful to minors. To rule that municipalities are powerless to choose not to fund access to such intentional traps for the unwary youth when attempting to simply provide access for a child-friendly view of the White House would be egregious.

The proliferation of obscenity has a detrimental impact on a local community. Oklahoma City, for example, chose to do something about their rising incidence of rape by closing over 150 sex-oriented businesses (peep shows, massage parlors, bookstores, theaters, etc.) from 1983 to 1988. During that span of five years, the incidence of rape in Oklahoma City decreased by 26%. During that same period, the incidence of rape increased 20.8% throughout the entire state.[14] Municipalities need the local control necessary to affect change in their communities by reducing the factors that put women at a high risk for sexual violence. Such local control includes having the power to choose not to pay for access to the very obscenity it is trying to combat to save the lives of women in the community.

Even the federal government agrees that "empirically verifiable connections have been established between illegal pornography and violent sex related crimes, including the rape of women and molestation of children."[15] A

[14] OKLAHOMA STATE BUREAU OF INVESTIGATION, RAPE STATISTICS – OKLAHOMA CITY VS. BALANCE OF OKLAHOMA, 1983-1988.

[15] U.S. DEPARTMENT OF JUSTICE, CRIMINAL DIVISION, BEYOND THE PORNOGRAPHY COMMISSION: THE FEDERAL RESPONSE (Washington, DC: GPO, July 1988), p. iv.

study of sex offenders reported that fifty-six percent of the rapists and 42 per cent of the child molesters in the sample said that pornography played a role in their offenses.[16] Even this Court has recognized the harmful effects of pornography on children. *See Ferber*, 458 U.S. at 758; *FCC v. Pacifica Foundation*, 438 U.S. 726, 757-58 (1978).

Local municipalities, being the smallest form of government in this country and most sensitive to the needs of their unique communities, are in the best position to determine the type of Internet access they will provide for their citizens. Local government is uniquely positioned to significantly impact the welfare of women and children. This Court should not stifle the ability of municipalities to protect vulnerable members of society from sexual predators. There are many rational bases which could lead municipalities to choose to filter Internet access in the best interests of their community. The decision below should be reversed.

[16] Abel, G., *in* EINSIEDEL, E.F., SOCIAL SCIENCE REPORT. PREPARED FOR THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, U.S. DEPARTMENT OF JUSTICE (Washington, D.C., 1986).

CONCLUSION

Cities, mayors, county commissioners and other local officials should be free to choose the type of Internet access they will subsidize. There is no individual right for citizens to compel government to finance their Internet desires. The lower court's opinion, based on a non-existent right, destroys the choices local communities may make concerning their Internet access in their libraries. The decision below should be reversed.

Respectfully submitted,

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No. 02-361

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

AMERICAN LIBRARY ASSOCIATION, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF THE GREENVILLE, SC, KAYSVILLE, UT, AND KENTON COUNTY, KY PUBLIC LIBRARIES AS *AMICI CURIAE* IN SUPPORT OF THE APPELLANTS

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QUESTION PRESENTED

Whether a public library's use of filtering software in an effort to reduce the ability of library patrons to access and display illegal obscenity and child pornography violates the First Amendment.

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v.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF THE GREENVILLE, SC, KAYSVILLE, UT, AND KENTON COUNTY, KY PUBLIC LIBRARIES AS *AMICI CURIAE* IN SUPPORT OF THE APPELLANTS

Interests of the *Amici*

This brief is filed with the consent of the parties[1] on behalf of the Greenville, SC, County Library, the Kaysville, UT, City Library and the Kenton County, KY, Public Library. Each of the *amici* is a public library that wants to be able to use filtering software on its Internet browsers without

[1] The parties' letters of consent have been filed with the Clerk in compliance with Rule 37.3. This brief was not authored in whole or in part by counsel for any party. The Center for the Community Interest provided funding for printing the brief.

becoming subject to judicial regulation under the First Amendment. The decision of the three-judge district court in this case rests on a conclusion that such filtering violates the First Amendment rights of library patrons. Regardless of the validity of the federal funding statutes directly at issue, any decision of this Court that reached the same conclusion would prevent public libraries from voluntarily using software filters to reduce the possibility that patrons would access illegal obscenity and child pornography. *Amici* therefore have an interest in having this Court reject the First Amendment analysis employed by the district court.

Amici also wish to advise the Court that the position taken by the American Library Association in this case is not shared by all libraries. There are many public libraries that believe the essence of a library's selection process involves precisely the form of content-based discrimination that the First Amendment normally prohibits. *Amici* believe that many public libraries think they should be free to select books without being subject to judicial review under the First Amendment. We believe that this "freedom to choose" also applies to the Internet and a decision to install filtering software. There are other public libraries, in addition to these *amici*, that share our views, but are inhibited from taking a public position contrary to the shortsighted request for judicial intervention that has been adopted by the ALA.

We believe the Court should consider the views of the many libraries that do not support the ALA position, especially with regard to the impact that prohibition of filtering will have on the library environment and the adverse precedential effect that applying traditional First Amendment principles will have on the basic process of selecting materials for inclusion in libraries.

Summary of Argument

The district court's application of the First Amendment is fundamentally inconsistent with the mission and purpose of libraries. The task of every library is to select material, based on its content, which will be made available to the library patrons. Judicial regulation of those decisions under the First Amendment would eliminate the traditional freedom of libraries to make accession decisions without external governmental control.

As the district court found, the Internet contains an extensive amount of illegal obscenity and child pornography. Unfiltered access to the Internet will inevitably allow library patrons to display unprotected and illegal materials in a public place. Libraries that have allowed unfiltered Internet access have experienced significant problems with regard to such illegal conduct. The district court's decision in effect requires public libraries to facilitate public display of illegal obscenity and child pornography.

The Court should vacate the decision below and hold that the First Amendment does not apply to accession decisions of public libraries.

Argument

I. The First Amendment Does Not Preclude Use of Internet Filtering Systems in Public Libraries

The district court concluded that the First Amendment applies to public library acquisition decisions and that the standard is "strict scrutiny." The Solicitor

General argues that if the First Amendment applies, the proper standard is "rational basis review." We submit that the Court has not yet decided whether the First Amendment has any application to a public library's choice of materials to be made available to its patrons. We further submit that the Court should conclude that the First Amendment does not govern a public library's decision to acquire materials or to make materials on the Internet available to patrons. To the extent there is a constitutional constraint on those decisions, it would be found in the Equal Protection Clause protection against invidious discrimination, not in the First Amendment protection of free speech.[2]

A. This Court Has Never Held That The First Amendment Applies to A Public Library's Acquisition Decisions – Amici Submit It Does Not

The district court decision rests on an assumption that the First Amendment applies to public libraries when they decide what information to make available to patrons. The assumption is not founded on any controlling precedent[3]. No prior opinion of this Court has decided whether the First Amendment applies to a library acquisition decision. The Court has considered the issue only once. In *Board of Education v. Pico*, 457 U.S. 853 (1982), the Court considered whether the First Amendment applied to a public

[2] If a library were to limit its acquisitions in a manner that amounted to discrimination against a race, gender, religion or political party, a court might properly conclude that the policy was unconstitutional under the Equal Protection Clause.

[3] The district court passed on the issue in a footnote: "Because we find that the plaintiff public libraries are funded and controlled by state and local governments, they are state actors, subject to the constraints of the First Amendment, as incorporated by the Due Process Clause of the Fourteenth Amendment." (J.S. App. 96a; 201 F.Supp.2d at 451, n 20)

school library's decision to remove certain books from its shelves. There was no opinion for the Court. Four Justices concluded that the removal violated the First Amendment, while four concluded that it did not. The deciding vote to remand for trial was cast by Justice White who believed the issue was not ripe for summary judgment and hence did not address the First Amendment issue. Justice Brennan's opinion concluding that the **removal** was unconstitutional pointedly distinguished a decision to **acquire** a book. *Id.* at 872-73. Internet filtering involves the acquisition process, not the removal of information that has already been acquired. There are no subsequent reported decisions and the *Pico* issue has not been considered here in the past 20 years.

We suggest that a principal reason behind the deeply divided decision of the Court in *Pico* was an awareness by several of the Justices of the consequences of holding that the First Amendment applied to decisions by a library concerning its holdings. The essence of sound librarianship with respect to acquisition and de-selection decisions is **content-based discrimination**. Librarians necessarily choose to allocate their limited resources[4] to materials they deem most appropriate for the patrons they serve. The process inherently requires library officials to make choices of what to offer based on the content of those materials.

[4] The district court correctly rejected the argument that unfiltered Internet access did not affect allocation of scarce resources. (J.S. App. 126a; 201 F.Supp.2d at 465, n 25) "The same budget concerns constraining the number of books that libraries can offer also limits the number of terminals, Internet accounts, and speed of access links that can be purchased, and thus the number of Web pages that patrons can view. This is clear to anyone who has been denied access to a Website because no terminal was unoccupied." Mark S. Nadel, *The First Amendment's Limitations on the Use of Internet Filtering in Public and School Libraries: What Content Can Libraries Exclude?*, 78 Tex. L. Rev. 1117, 1128 (2000).

The essence of librarianship is, in short, inconsistent with one of the basic tenets of traditional First Amendment jurisprudence that content-based decisions regarding speech are suspect.[5] If the Court adopts the district court's conclusion, Chief Justice Berger's concern that "this Court would come perilously close to becoming a 'super censor' of . . . library decisions" would become a reality. *Pico, supra,* at 885. Given the heightened awareness of library acquisitions that this case has spawned, it would not be possible to limit any decision applying the First Amendment in this case to the narrow issue of Internet filtering. Application of the First Amendment here will be an open invitation to further federal litigation on any public library acquisition or de-selection decision that any patron, author or publisher disagrees with. The Court should not expand the judiciary's role by rendering a decision that the First Amendment applies. Such a decision would fundamentally alter the allocation of responsibility for control of library accession decisions. Affirmance of the district court's

[5] This traditional principle does not apply if the government entity is not a traditional public forum. In such cases, content-based decisions are permissible. In addition, the Supreme Court has in recent years clarified that the essence of the traditional judicial antipathy to content-based decisions needs to be re-formulated to clarify that the area of judicial concern is really with "viewpoint" discrimination as distinguished from "content" discrimination. The Solicitor General correctly explains why this case does not involve any "viewpoint discrimination" (Juris. Statement at 22).

decision would, in effect, make the federal judiciary the national Supreme Librarian.[6]

There is no textual or historical basis for applying First Amendment limitations to public library acquisition decisions. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." This case – like the government grants considered in *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) – does not involve any governmental action to suppress or prevent anyone from speaking or receiving any speech. All that Internet filtering does is to restrict use of government resources for transmission of certain speech through a specific channel. No speaker whose website is blocked by an Internet filter is precluded from publishing that same speech in any form, using any medium. No patron of any library that uses filtering is precluded from having access to that speech through other Internet facilities. As such, this case fits Justice Scalia's observation in *NEA v. Finley* that denial of public resources to support or provide an outlet for speech is not by any means an *abridgment* of that speech. *Id.* at 2182-85 (concurring opinion).

Because a library's Internet filtering system does not suppress any communication, but merely closes one discrete

[6] This characterization is not rhetorical exaggeration. Last October the ACLU filed a complaint in the Southern District of Georgia to compel a public library to provide space for distribution of free publications. *See The Gay Guardian Newspaper v. Ohoopee Regional Library System,* 02-CV-104 (S.D. Ga). The Complaint is available online at http://www.aclu.org/Files/OpenFile.cfm?id=10850. The district court in this case attempted to distinguish its decision on Internet filtering from a library decision to include or exclude a particular book. The Solicitor General argues persuasively that this distinction is untenable. But the existence of that extended discussion in the district court's opinion illustrates the fundamental inconsistency between core First Amendment jurisprudence and the core mission of libraries.

pathway involving certain specific government-owned facilities, it is not a abridgment of speech within the protection of the First Amendment.[7]

B. If The First Amendment Applies, The "Reasonable Basis" Standard Applies, Not The "Strict Scrutiny" Standard

The district court concluded that the "strict scrutiny" standard applies to library filtering. We agree with the Solicitor General that if the First Amendment applies at all, the "rational basis" test is the appropriate standard.

For purposes of the First Amendment, this "Court [has] identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). "Traditional" public fora include those places which "by long tradition or by government fiat have been devoted to assembly and debate." *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). They include "streets and parks which have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.* at 45 (internal quotation marks and citations omitted). Computers are devices of very recent origin. They are manifestly not in the category of traditional public fora.[8]

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[7] There is no historical basis for extending First Amendment protections to public libraries. The first public library was established in Boston in 1854, more than 60 years after adoption of the First Amendment.

[8] *See International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 694 (1992) ("Airports are of course public spaces of recent vintage, and so there can be no time-honored tradition associated with airports of permitting free speech") (Kennedy, J. concurring).

A "designated" public forum "consists of public property which the State has opened for use *by the public* as a place for expressive activity." *Id.* at 45 (emphasis added). Moreover, in order to be a "designated" public forum, the property must be open to "*indiscriminate* use by the general public." *Id.* at 47 (emphasis added). Thus this Court has explained that "[t]he mere fact that an instrumentality is used for the communication of ideas does not make a public forum . . . . Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities, immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require." *Perry*, 460 U.S. at 49, n.9 (internal quotation marks and citations omitted). No library has opened its doors for indiscriminate use by the public at large for all communication purposes. Libraries accordingly are not properly characterized as "designated" public fora. *But see Kreimer v. Bureau of Police*, 958 F.2d 1242, (3d Cir. 1992)(concluding that a library is a designated public forum and upholding library regulations on patron behavior).

A "non-public forum" (sometimes called a "non-forum") consists of "publicly-owned facilities that have been dedicated for either communicative or non-communicative purposes, but that have never been designated for indiscriminate expressive activity by the general public." SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 8:8. Libraries fall into this category and are subject to the broad authority that government may exercise over such property.

In the traditional forum content-based regulations of citizen speech are subject to strict scrutiny. Such regulations will survive challenge only if "narrowly drawn to achieve a compelling state interest." *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). In a "designated" forum the government may dedicate it to

certain purposes and impose limitations that are "reasonable in light of the purpose served by the forum," as long as the regulation does not result in "viewpoint discrimination." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (quoting *Cornelius*, 473 U.S. at 406). By contrast, in a non-public forum "the state has maximum control over communicative behavior since its actions are most analogous to that of a private owner." *Paulsen v. County of Nassau*, 925 F.2d 65, 69 (2nd Cir. 1991). "[G]overnment imposed restrictions of speech in [non-public fora] will be upheld so long as reasonable and viewpoint neutral." *Lee Art Theater, Inc. v. Virginia*, 505 U.S. 636, 694. (Kennedy, J. concurring). As Smolla and Nimmer have pointed out:

> The government "may reserve the forum for its intended purposes *communicative or otherwise*, as long as the regulation of speech is reasonable and not an effort to suppress expression merely because public officials opposed the speaker's view. Entire classes of speech thus may be excluded from a non-forum. Those classes may be identified by content, as long as the exclusion is reasonable in light of the purpose of the forum and there is no discrimination upon viewpoints *within a* class.

SMOLLA AND NIMMER § 8:8 (quoting *Perry*, 460 U.S. at 47 with emphasis added by Smolla and Nimmer).

The communications that are the target of the filtering software mandated by the federal statute are websites containing obscenity, child pornography or material harmful to minors. This restriction is manifestly the sort of content-based regulation that is permissible under the First Amendment standard that governs "designated" fora or non-

public fora. This restriction has nothing to do with point of view.[9]

C. Internet Filtering Meets Both the "Reasonableness" and the "Least Restrictive Means" Tests

The Solicitor General and other *amici* have shown why filtering software is a reasonable restriction on Internet access in a public place. We submit that current obscenity filtering software is the least restrictive means of precluding access to illegal pornography, despite the acknowledged inherent inaccuracies in filtering technology.

The filtering software considered by the district court here is intended to reduce access to materials that are obscene, constitute child pornography or contain material harmful to minors. There is no doubt that the public interest in limiting that access is a compelling government interest. Six present members of this Court have agreed that the "interest of protecting children [from seeing patently offensive sex-related material on TV] is compelling." *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 747 (1996) (opinion of Justice Breyer, joined by Justices Stevens, O'Connor and Souter, stating that the view is shared by Justices Kennedy and Thomas).

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[9] *See General Media Comm. v. Cohen*, 131 F.3d 273, 282 (2nd Cir. 1997), 1997 U.S. App. LEXIS 40571 *23 (corrected Mar. 25, 1998) (rejecting as "linguistic overreaching" claim that "lasciviousness" is a viewpoint); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (rejecting claim that "offensively lewd and indecent speech" was related to political viewpoint); *Board of Educ. v. Pico*, 457 U.S. 853, 871 (1982) (plurality opinion) (an "unconstitutional motivation could not be demonstrated" if school board removed library books because they were "pervasively vulgar" rather than because of "disfavored ideas").

The district court held that filtering software was not the least restrictive means for protecting the government's interest. That holding is based on a misapplication of the least restrictive means doctrine. The doctrine requires an assessment of the specific legitimate government goal and the desired goal, a consideration of how well the challenged practice achieves that goal and a comparison of alternatives with regard to whether they achieve the **same** goal with less restriction of protected speech. "[T]here must be a congruence between the means used and the ends to be achieved." *City of Boerne v. Flores*, 521 U.S. 507, 530 (1977).

The district court concluded that filtering software blocked too much protected speech in comparison with other alternative procedures. The flaw in that comparison was that the district court failed to focus on the legitimate goal – *reducing patron's access to unprotected obscenity and child pornography*. None of the alternatives that the district court considered **reduced** access to illegal materials. All that most of the alternatives did was to reduce the risk that someone other than the patron who was using the Internet terminal would be exposed to the materials. The "tap on the shoulder" and "report it to the police" alternatives do not reduce the probability of access; they are "after-the-fact" sanctions. Similarly installation of privacy screens cannot reduce the probability of illegal access. Those less restrictive alternatives relied upon by the district court are simply not comparable to filtering software because they do not block access to the illegal material.

The only alternative considered by the district court that has any prophylactic potential is the "proper use policy" approach. But no one would contend that a paper policy is as effective as filtering software in actually preventing access to

illegal materials.[10] The First Amendment does not require a government entity to use a less effective restriction in order to achieve a legitimate end. Before a particular restriction can be held unconstitutional, the court must find that there is an alternative that is less restrictive with respect to protected speech, but equally effective at regulating the unprotected speech. The district court failed to apply this basic principle.

Filtering software is imperfect. All observers agree on that. But no one has yet suggested any equally effective – but less restrictive – means of reducing access to the vast sea of unprotected illegal materials that is on the Internet. The Internet filtering software available today is the least restrictive means available for achieving the legitimate goal of libraries that wish to limit access to such materials.[11]

D. Libraries, Like the Postal Service, Are Not Compelled to Transport Obscene Materials

The district court rested its decision, in part, on an analogy to the postal service. It cited *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965) and *Blount v. Rizzi*, 400 U.S. 410 (1971), two decisions regarding restrictions on access to postal services. While analogies to the Postal Service are not perfect, there is some legitimacy in considering practices in that communications channel in this context. Both the Postal Service and public libraries act as conduits for information.

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[10] The actual experience of *amicus* Greenville County Library as described below shows how ineffective "tap on the shoulder" and proper use policies are in deterring access.

[11] We recognize that application of a "least restrictive means" analysis might preclude use of specific filtering software that failed to conform to "best practices" in the industry and blocked far more protected speech and far less unprotected speech than available alternative software. But that possibility does not justify the blanket conclusion of the district court that ***all*** filtering software is unconstitutional.

But it is well established that the Postal Service cannot be used to carry obscene materials. Section 1461 of Title 18 of the United States Code specifically provides that "[e]very obscene, lewd, lascivious, indecent or filthy article . . . is declared to be nonmailable matter and shall not be conveyed in the mails or delivered by any letter carrier." The Court has repeatedly held that the statute is constitutional. *Roth v. United States*, 354 U.S. 476 (1957); *United States v. Reidel*, 402 U.S. 351 (1971); *Smith v. United States*, 431 U.S. 291 (1977). Prosecutions under that statute are not uncommon.[12]

If the Postal Service – a nationwide government monopoly – cannot be used to carry obscene material, then certainly a local library can refuse to disseminate obscene material, whether in print or on the Internet.[13] This conclusion is particularly appropriate in light of the fact that closing the mails to obscene material represents a government refusal to allow a unique and irreplaceable government asset to be used by citizens to communicate materials that are not protected by the First Amendment. As

[12] *See, e.g., United States v. Schein*, 31 F.3d 135 (3rd Cir. 1994); *United States v. Carmack*, 910 F.2d 748 (11th Cir. 1990); *United States v. Kuennen*, 901 F.2d 103 (8th Cir. 1990), *certiorari denied*, 498 U.S. 958. Each case was a prosecution under 18 U.S.C. § 1461.

[13] Nothing in the Court's subsequent decision in *Manual Enterprises v. Day*, 370 U.S. 478 (1962) undercuts this argument. In that case a publisher of magazines sued to overturn an administrative refusal to accept certain magazines for mailing. A divided seven-Justice Court set the refusal aside. Justices Harlan and Stewart concluded that the magazines in question "cannot be deemed legally 'obscene.'" *Id.* at 482. Justices Brennan, Douglas and the Chief Justice concluded that the criminal statute did not authorize administrative action to refuse to accept matter for mailing. *Id.* at 495-519. Justice Clark dissented and would have upheld the administrative exclusion against the First Amendment challenges. Justice Black concurred in the judgment without joining or expressing any opinion. *Id.* at 495. Justices White and Frankfurter did not participate in the decision. *Id.*

noted above, closing a public library's Internet terminals to obscenity leaves library patrons free to access that material through other terminals.

The administrative scheme invalidated in *Blount v. Rizzi* as an unconstitutional limitation of First Amendment rights allowed the Postmaster General to detain all mail sent to individuals believed to be using the postal system for commerce in obscene materials. The regulatory scheme was comprehensive and affected all incoming mail, without regard to whether the specific item was obscene material. When a library uses filtering, it does not prevent any individual from accessing the Internet. The filters do not delay or deny access to the total Internet universe, but instead limit access by blocking a relatively miniscule segment of that vast sea of Internet information. An administrative detention of all incoming mail is markedly different from a selective denial of access to a limited amount of material.

Lamont v. Postmaster General involved an administrative interference with delivery of mail believed to be communist propaganda, material that was protected by the First Amendment. That administrative scheme was based on viewpoint discrimination. The Internet filtering at issue here shares neither of those characteristics. Obscenity and child pornography is not protected by the First Amendment and the filtering software used by libraries does not involve any discrimination against a particular viewpoint.

II. Public Libraries Have a Duty, Not Merely a Right, to Filter Internet Pornography to Avoid Facilitating The Felonies That Are Committed When Patrons Access Obscenity Or Child Pornography In A Public Place

It is indisputable that there is a vast amount of obscenity and child pornography on the Internet that is not protected by the First Amendment and is illegal under state and federal laws. The material of concern is not "soft core pornography" but plainly obscene material. The Government put examples of some of that material in the trial court record. *E.g.* Def. Ex. 185A. Other examples of material that is even more "hardcore" than the trial exhibits can be found with ease using a common Internet search engine.[14] It is also indisputable that when a library offers unfiltered access to the WorldWideWeb, library patrons can and will access and display illegal material.[15] *See, e.g., What Would Dewey Do? Libraries Grapple With Internet,* THE NEW YORK Times, Dec. 2, 2002. Well-publicized proceedings across the nation prove that access to illegal obscenity on the Web is not a theoretical problem, but a real

[14] A January 2003 search for Internet sites using the term "anal sex" and the www.google.com search engine produced more 2,000,000 "hits". While not all those sites contain illegal obscene material, many of them do. A few examples of the numerous sites that are plainly obscene are: http://www.absoluteanalporn.com/; http://www.abbeyxxx.com/top100/; http://www.bestiality.com/; http://ultrahardcore.com/; and http://www.xratedpics.com/.

[15] Congress was provided documentation of over 2,000 instances of patrons, many of them children, accessing pornography, obscenity, and child pornography in the nation's public libraries. Defts' Ex. 6 (H.R. Serial No. 106-115), at 30; *see also* Defts' Ex. 8 ("Dangerous Access" Report) (available at http://www.frc.org/get/bl063.cfm).

one that has caused a significant re-allocation of law enforcement resources. Indeed the Department of Justice has created a special component for investigating and prosecuting Internet child pornography.[16]

The experiences of each of the *amici* illustrate the extent of the problem. The Kenton County Library initially offered access to the Internet on an unfiltered basis. They found that patron demand for their terminals exceeded their expectations. The sole interest of a significant number of patrons appeared to be pornography. Parents complained that their children had seen pornography on terminal screens, including one instance where the default desktop image on a terminal had been changed to a pornographic picture. Pictures of sex acts were left in the output trays of library printers. Eventually the library installed filtering software to reduce the incidence of such problems. If the district court's decision were affirmed, Kenton County could no longer use its filtering software, regardless of any receipt of federal funds.

The Kaysville Utah Library has a "proper use" policy that advises patrons that the library terminals are for reference research and that pornography does not qualify as a reference tool. Patrons are advised that violation of the policy can lead to loss of library privileges. Reviews of the logs of Internet access have disclosed frequent violations of the stated policy. The library believes a possible pedophile has used the terminals for contacting potential victims. Some patrons have altered terminal settings to leave objectionable images on the screen. The problems have been so extensive that the library decided to re-locate all terminals

[16] Child Exploitation and Obscenity Section, DOJ Criminal Division. *See* http://www.usdoj.gov/criminal/ceos/inves_prosec.htm

into the main body of the library so the staff could see all the screens and monitor use better.

The Greenville County Library first offered unfiltered Internet access in the summer of 1998. While the written policy included a provision that users could not "display obscene materials, child pornography, and/or other materials prohibited under applicable local, state, and federal laws," the former Executive Director told the staff that they should never interfere with a patron's use of the terminals, regardless of what was displayed on the terminals.[17] In February 2000 the library instituted a "tap on the shoulder" policy and installed "privacy desks" around the majority of Internet terminals. Those changes did not, however, significantly reduce access to improper materials. A library staff member estimated that 20-25% of patrons used the Internet to access pornography and/or obscenity. A June 27, 2000 review of the log file from one terminal revealed that at least 20% of the sites visited were pornographic or obscene.

During one nine month period the Greenville Library documented more than 100 such incidents including:

- A live video of people engaging in heterosexual and homosexual sex.
- A live video of people engaging in sex with animals, including a girl with a strapped on plastic penis having sex with a dog and a man having sex with a chicken.
- A live video of men having oral sex with boys.
- A live video of a male ejaculating onto the face of a woman.
- Live videos of male and female masturbation.

[17] That individual is no longer with the library. His policy was consistent with – if not strongly influenced by -- the policy of the Appellee American Library Association.

Library staff also reported several instances of adults exposing children to pornography and/or obscenity using the Internet terminals. Many more examples, including access to child pornography and access by minors, are documented in the Report of the Greenville Operations Committee.[18] The reported incidents are believed to represent merely a fraction of the actual number incidents that have occurred.

The Greenville Library Committee concluded that the "proper use," "tap on the shoulder" and "privacy desk" policies were ineffective. The majority of the incidents reported had occurred after those measures had been implemented. The Library ultimately installed filtering software. (J.S. App. 40a; 201 F.Supp.2d at 424) In the year following "installation of the [filtering software] in July of 2000, there [had] been no Internet related incidents involving library security staff, no complaints by the public and only twelve (12) web sites have had to be blocked locally and twelve (12) sites have been unblocked locally." *Greenville County (SC) Library System Case Study for N2H2*, (June 2001) available through the Internet at http://www.n2h2.com/pdf/library_case_study.pdf.

Public libraries are government agencies. As such it is especially important that they not only act lawfully, but also avoid actions that will facilitate unlawful actions of their patrons. No reasonable person would suggest that a library has a responsibility to provide not only information on drugs, but also the means for patrons to make drugs in the library. Yet that is precisely what the proponents of "no filters" in essence urge. The position advanced here by the Appellees – and accepted by the district court – is that once a library

[18] The Greenville Report can be accessed on the Internet at http://www.copacommission.com/papers/greenvillereport.pdf. The Chairman of the Greenville Library Board testified at the trial below.

decides to allow any access to the Internet, it is compelled by the First Amendment to give its patrons all the tools they need in order that they might commit felonies in a public place using public facilities. That position, we submit, defies logic, common sense and any reasonable interpretation of the core concepts of the Constitution and the Rule of Law.

In most of the states public display or obscene material is illegal. In many it is a felony.[19] Interstate transmission of child pornography, including viewing files over the Internet, is a federal crime.[20] The Oklahoma and Tennessee Attorneys General have opined that if library personnel knowingly allowing a minor library patron to view material that is harmful to minors they could expose themselves to criminal liability.[21] The Tennessee Attorney General advised that implementation of filtering software would be a defense to any such charge, if filtering is constitutional. But regardless of any criminal liability for library employees, intentional access and display of obscene materials or child pornography by a library patron would be

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[19] A listing of all state obscenity laws is available at http://www.morality inmedia.org/nolc/index.htm?statutesIndex.htm

[20] 18 U.S.C. §§ 2252, 2252A; *see also* 18 U.S.C. § 1465 (interstate transportation of obscenity); *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996) (conviction for transmitting obscenity using personal computers and telephones upheld); *United States v. Matthews*, 11 F. Supp. 2d 656 (D. Md. 1998) (prosecution of a seasoned reporter for receiving and transmitting child pornography over the Internet; denial of First Amendment defense)

[21] The February 22, 2000 opinion of the Tennessee Attorney General is available from the Tennessee Attorney General's website at http://www.attorneygeneral.state.tn.us/op/2000/OP/OP30.pdf. The June 16, 1997 opinion of the Oklahoma Attorney General is available as a part of a March 2000 guide for libraries published by the Oklahoma Department of Libraries and available over the Internet at http://www.odl.state.ok.us/fyi/filtering.pdf.

criminal conduct under many state laws. The crime would be committed using equipment made available by a state agency, knowing that the equipment could be – and likely would be – used to view illegal materials.

We submit that this Court has not previously construed the First Amendment to require a government agency to facilitate the commission of criminal offenses. We do not believe the First Amendment should be so construed now. As Justice Goldberg wrote for the Court almost 40 years ago, "while the Constitution protects against invasions of individual rights, it is not a suicide pact." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). It is also not a basis for compelling a public library to aid and abet criminal conduct.

Conclusion

For the reasons stated in this and other briefs, the Court should vacate the decision of the district court and hold that the First Amendment does not preclude use of Internet filtering software by public libraries.

Respectfully submitted,

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IN THE

Supreme Court of the United States

UNITED STATES, *et al.*,

Appellants,

v.

AMERICAN LIBRARY ASSOCIATION, INC., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF *AMICUS CURIAE* JONATHAN WALLACE d/b/a THE ETHICAL SPECTACLE IN SUPPORT OF APPELLEES

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INTEREST OF THE AMICUS CURIAE *

Jonathan Wallace d/b/a The Ethical Spectacle respectfully submits this brief as *amicus curiae* in support of appellees' assertion that the district court correctly determined that Sections 1712 and 1721(b) of the Children's Internet Protection Act, Pub. L. No. 106-554, Div. B, Tit. XVII, 114 Stat. 2763A-335 ("CIPA") are unconstitutional.

The Ethical Spectacle (http://www.spectacle.org) is an online publication focusing on the intersection at which ethics, law and politics meet in our civilization, particularly in the United States of America. This involves promoting freedom of speech, compassion, fairness and humility as the fundamental building blocks of private and public life. The Ethical Spectacle mission statement is available at: http://www.spectacle.org/mission.html. The Ethical Spectacle has appeared monthly on the World Wide Web since January, 1995. Wallace edits, and contributes at least one essay to, each issue. In connection with these activities, Wallace was a co-plaintiff in *Reno v. ACLU*, 521 U.S. 844 (1997) (the "Communications Decency Act" case) and in *Mainstream Loudon v. Board of Trustees of the Loudon County Library*, 24 F. Supp. 2d 552 (E.D. Va. 1998) (case striking down the use of software filters in libraries).

The Ethical Spectacle has been blocked, in whole or part, by at least six software filters. *See Mainstream Loudon v. Board of Trustees of the Loudon County Library*, 24 F. Supp. 2d at 558. Individual content of The Ethical

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* The parties have consented to the filing of this brief. Their letters of consent are being lodged herewith. This brief has been authored in its entirety by undersigned counsel for the *amicus curiae*. No person or entity, other than the named *amicus* and its counsel, made any monetary contribution to the preparation and submission of this brief.

Spectacle that has been blocked by various filters include parts of a compilation of materials about free speech (http://www.spectacle.org/musm.html) and an issue containing several essays about the social implications of pornography (http://www.spectacle.org/1195/). Wallace's account of being blocked by various software filters appears at http://www.spectacle.org/cs/means.html.

Wallace believes that CIPA would prevent individuals from accessing constitutionally protected speech that has substantial scientific, political, social and literary value.

The *amicus* urges this Court to clarify and stabilize the legal rules applicable to the Internet by according speech on the Internet the highest protection bestowed upon speech in any medium. To do so, the Court should acknowledge the essential similarity between the Internet and print media.

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

Sections 1712 and 1721(b) of the Children's Internet Protection Act, Pub. L. No. 106-554, Div. B, Tit. XVII, 114 Stat. 2763A-335 ("CIPA") are an intrusive government regulation of constitutionally protected speech, fashioned in apparent ignorance of the technological medium it was intended to regulate. We join with appellees to urge affirmance of the judgment below holding that CIPA is unconstitutional. We file this brief, however, to urge this Court to focus on an issue the Court deferred in its previous opinion related to the government's attempts to regulate constitutionally protected speech on the Internet. *See Reno v. ACLU*, 521 U.S. 844 (1997).

We respectfully disagree with the Court's conclusion in *Reno* that it is both possible and desirable to determine *how*

to treat a new medium without first determining *what* it is. In the past, this Court has walked on firmer ground when it determined the proper legal regime for new media by seeking the correct analogy. We believe there is no proper alternative but to do so here.

This Court should recognize that the print medium is the proper analogy for the Internet. Like print, the Internet is a means for the replication, storage and transmission of huge amounts of text and images of every description and on every topic. The Internet is a global library or bookstore of all human knowledge and imposing any scheme of regulation more restrictive than that allowed for the print medium would have profoundly destructive effects. Only by recognizing the analogy between the Internet and print media will this Court assure the appropriate protection of the medium which is likely to become the main conduit for personal, political and creative speech for many decades to come.

Confusion over the proper analogy for the Internet has led and will continue to lead to a wide variety of opposing and legally infirm actions in state and federal courts, Congress and state legislatures, including federal and state laws regulating content, as well as the prosecution of individuals for speech which would clearly be protected in print. Only by issuing a clear ruling that the Internet is analogous to print media can this Court assure the development of a stable legal regime. Stability will promote the growth of this medium, while the application of rules more restrictive than those permitted for print will stifle the Internet's maturation and will also lead to the contradictory result of the same content receiving different treatment in electronic format than on paper.

Therefore, we join appellees in requesting this Court to affirm and further urge that it eliminate legal confusion by

specifically declaring that the Internet is analogous to, and should for First Amendment purposes be treated like, print media.

ARGUMENT

I.

THE TIME IS RIPE FOR THIS COURT TO SELECT THE CORRECT ANALOGY FOR CYBERSPACE.

For a court to consider the proper legal regime for a new communications medium, it is essential that it first select an appropriate analogy to prior media. A decision not founded on analogical reasoning runs the risk of misapprehending the social significance of a new technology, and therefore applying the wrong rules.

In *Technologies of Freedom*, communications scholar Ithiel de Sola Pool traced the process used by this Court and others in the nineteenth century to resolve disputes pertaining to the telegraph and telephone:

> Courts like to treat new phenomena by analogy to old ones. When the telephone was invented, the question was whether, at law, the telephone was a new kind of telegraphy or something different. If the phone was a telegraph, a body of law already existed that would apply. The decisions sometimes went one way, sometimes the other; but the model of the telegraph was always there to be considered.

Ithiel de Sola Pool, *Technologies of Freedom* 100 (1983).

This Court has usually adopted such an approach and has searched for the appropriate analogy in determining the

proper legal regime for a new technology. In *Primrose v. Western Union Telegraph Co.*, 154 U.S. 1 (1894), this Court selected the railroad as the appropriate analogy for the telegraph, thus determining which line of precedents to follow. In applying analogical reasoning, the *Primrose* Court recognized that "[t]elegraph companies resemble railroad companies and other common carriers, in that they are instruments of commerce, and in that they exercise a public employment, and are therefore bound to serve all customers alike, without discrimination." *Id.* at 14.

The issue arose, as well, when the telephone was in its infancy, and many courts chose to apply jurisprudence developed for the telegraph. *See, e.g., Northwestern Tel. Exch. Co. v. Chicago, M. & St. P. Ry. Co.*, 79 N.W. 315, 317 (1899) ("The rule is well established that in applying the principles of the common law or in construing statutes the telephone is to be considered a telegraph"); *Hudson River Tel. Co. v. Watervliet Turnpike & Ry. Co.*, 32 N.E. 148, 149 (1892) (applying statutes authorizing telegraph transmission to telephone); *Attorney General v. Edison Telephone Co.*, 6 Q.B.D. 244 (1880) (same); *See also Duke v. Central New Jersey Telephone Co.*, 21 A. 460 (N.J. 1891) (The telephone is a "novel method for accomplishing the object for which telegraphs were erected"); *But see City of Richmond v. Southern Bell Telephone & Telegraph Co.*, 174 U.S. 761 (1899) in which this Court declined to follow this analogy.

Determinations that fail to utilize analogical reasoning are almost always eroded over time or reversed later, but may cause harm in the intervening years. For example, when this Court first considered the applicability of the First Amendment to the newly created technology of motion pictures in *Mutual Film Corp. v. Industrial Comm. of Ohio*, 236 U.S. 230 (1915), it distinguished them from the press and denied them protection on the grounds they were

"a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded . . . as part of the press of this country, or as organs of public opinion." *Id.* at 244.

Then, in 1952, in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), the Court reversed itself, properly recognizing the analogy between movies and printed matter:

> That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures.

Id. at 501.

The Court went on to acknowledge a need for consistency among the treatment of varying media: "Each method [of communication] tends to present its own peculiar problems. But the basic principle of freedom of speech and of the press, like the First Amendment's commandments, do not vary." *Id.* at 503.

In *Leathers v. Medlock*, 499 U.S. 439 (1991), Justices Marshall and Blackmun more recently expressed a similar view. "Although cable television transmits information by distinctive means, the information service provided by cable does not differ significantly from the information services provided by . . . newspapers, magazines, television broadcasters, and radio stations." *Id.* at 457 (Marshall, J., joined by Blackmun, J., dissenting).

In other words, to attain consistency of First Amendment outcomes, the courts and the legislatures should treat the method of storage or transmission as irrelevant, and focus instead upon the information itself.

Notwithstanding the effectiveness of analogical reasoning in deciding media cases and the judicial success stories associated with it, this Court still seems reluctant to apply this approach when it comes to new media. In 1996, a fragmented Court in *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727 (1996) declined to identify an appropriate analogy for cable television:

> [N]o definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard, good for now and for all future media and purposes. . . . Rather, aware as we are of the changes taking place in the law, the technology, and the industrial structure, related to telecommunications, we believe it unwise and unnecessary to pick one analogy or one definitive set of words now.

Id. at 742-43 (citations omitted).

Indeed, Justices Kennedy and Ginsburg noted that the plurality erred in declining to identify the correct analogy for cable, and thereby missed an important decisional opportunity:

> The [plurality] opinion treats concepts such as public forum, broadcaster, and common carrier as mere labels rather than as categories with settled legal significance; it applies no standard, and by this omission loses sight of existing First Amendment doctrine. When confronted with a threat to free speech in the context of an emerging technology, we ought to have the discipline to analyze the case by reference to existing elaborations of constant First Amendment principles.

Id. at 780-81 (Kennedy, J., joined by Ginsburg, J., concurring in part, concurring in the judgment in part and dissenting in part).

Moreover, they asserted that the "creation of standards and adherence to them, even when it means affording protection to speech unpopular or distasteful, is the central achievement of our First Amendment jurisprudence." *Id.* at 785. The use of analogy is a "responsibility," rather than the "luxury" the plurality considered it to be. *Id.* at 787. Ultimately, Justices Kennedy and Ginsburg concluded as follows:

> Another troubling aspect of the plurality's approach is its suggestion that Congress has more leeway than usual to enact restrictions on speech when emerging technologies are concerned, because we are unsure what standard should be used to assess them. Justice Souter recommends to the Court the precept, 'First, do no harm.' . . . The question, though, is whether the harm is in sustaining the law or striking it down. If the plurality is concerned about technology's direction, it ought to begin by allowing speech, not suppressing it.

Id.

In his concurrence in *Denver*, Justice Souter expressed some concern that the adoption of a standard might "have immense, but now unknown and unknowable effects" on related technologies. *Id.* at 777. However, he also stated that a strict categorical approach "keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said." *Id.* at 774.

In *Reno v. ACLU*, 521 U.S. 844 (1997), the Court had the opportunity to select the proper analogy to determine a consistent legal regime for the Internet. Yet, the Court declined to do so, stating that "[a]nyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficult to categorize precisely." *Id.* at 851. Notwithstanding this disinclination, the Court did imply throughout the opinion that the Internet was more analogous to print than to other media.

Thus, the Court used several bookstore, pamphleteer, publisher and library examples to describe the various ways in which content on the Internet is presented.

> From the publishers' point of view, it constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers and buyers. Any person or organization with a computer connected to the Internet can "publish" information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals.

Id. at 853. "Through the use of Web pages, mail exploders, and newsgroups, [anyone] can become a pamphleteer." *Id.* at 870. "The CDA is therefore akin to a law that makes it a crime for a bookstore owner to sell pornographic magazines to anyone once a minor enters his store." *Id.* at 893. "The Web is thus comparable, from the readers' viewpoint, to [] a vast library including millions of readily available and indexed publications. . . ." *Id.* at 853.

The Court further implied that the Internet is more like print by distinguishing the Internet from other media. Quoting the district court, this Court stated "[u]nlike communications

received by radio or television, 'the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial. A child requires some sophistication and some ability to read and to retrieve material and thereby to use the Internet unattended.'" *Id.* at 854. (citing the district court's Findings of Fact in *ACLU v. Reno*, 929 F. Supp. at 845).

Later in the opinion, the Court laid out the history and rationale for several previous decisions for the way various media should be treated for First Amendment purposes:

> Each medium of expression . . . may present its own problems. Thus, some of our cases have recognized special justifications for regulation of the broadcast medium that are not applicable to other speakers. In these cases, the Court relied on the history of extensive Government regulation of the broadcast medium, the scarcity of available frequencies at its inception and its invasive nature. *Those factors are not present in cyberspace.* Neither before nor after the enactment of the CDA have the vast democratic forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry. *Moreover, the Internet is not as invasive as radio or television.*

Id. at 868-869 (emphasis added).

The Court further differentiated the Internet from radio and broadcast precedents by holding the "spectrum scarcity" rationale used by the Court in *Pacifica* inapplicable to the Internet. "[U]nlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a 'scarce' expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds." *Id.* at 870.

The Court stopped short, however, of firmly stating that for First Amendment purposes, the Internet should be given the highest degree of protection. In essence, the Court drew all the dots necessary to create a picture but failed to connect them. Indeed, buried at the end of Footnote 30, the Court stated that it did not consider the print analogy "[b]ecause appellees do not press this argument before the Court. . . ." *Id.* at 863.

The Court's failure to analogize the Internet to a prior medium has resulted in conflicting comparisons and definitions in lower courts. For example, in *American Library Association v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997), Judge Preska found that "the Internet is analogous to a highway or railroad." *Id.* at 161.

In *Mainstream Loudon v. Board of Trustees of the Loudon County Library*, 2 F. Supp. 2d 783 (E.D. Va. 1998), Judge Brinkema, ruling against the use of software filters on computer terminals at libraries said "[t]he Internet therefore more closely resembles plaintiff's analogy of a collection of encyclopedias from which defendants have laboriously redacted portions deemed unfit for library patrons." *Id.* at 793-4.

The district court judges in *ACLU v. Reno* also differed in their respective choice of analogies. For Chief Judge Sloviter, "Internet communication, while unique, is more akin to telephone communication, at issue in *Sable*, than to broadcasting, at issue in *Pacifica* . . ." *ACLU v. Reno*, 929 F. Supp. 824, 851 (E.D. Pa. 1996).

Judge Dalzell, on the other hand, argued that the Internet is a "new medium of mass communication, . . . [and] that First Amendment jurisprudence requires consideration of its special qualities . . ." *Id.* at 872. He further argued that,

"[t]he Internet is a far more speech enhancing medium than print, the village green, or the mails. . . . [and] may fairly be regarded as a never-ending worldwide conversation." *Id.* at 882-83.

In this case now before the Court, a second opportunity is presented where the Court can, once and for all, clearly and firmly state that the Internet, as "the most participatory form of mass speech yet developed" should be entitled to "the highest protection from governmental intrusion." *Reno v. ACLU*, 521 U.S. at 863 (citing Judge Dalzell's opinion in *ACLU v. Reno*, 929 F. Supp. at 883).

II.

THE PROPER ANALOGY FOR CYBERSPACE IS PRINT.

In discussing the lower court's opinion in *ACLU v. Reno*, this Court mentioned, albeit in a footnote, that:

> [f]our related characteristics of Internet communication . . . lead to the conclusion that Congress may not regulate indecency on the Internet at all. . . . First, the Internet presents very low barriers to entry. Second, these barriers to entry are identical for both speakers and listeners. Third, as a result of these low barriers, astoundingly diverse content is available on the Internet. Fourth, the Internet provides significant access to all who wish to speak in the medium, and even creates a relative parity among speakers.

Reno v. ACLU, 521 U.S. 844, 863. This description emphasizes the Internet's similarity to print media, where the barriers to entry are also lower than they are for broadcast

media and therefore, provide significant access to all who wish to distribute their own works of print.

Moreover, there seems to be a growing propensity, endorsed by Justice Thomas and joined by the Chief Justice and Justice Scalia in the *Denver* case, to regard even cable television as analogous to print:

> In *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622 (1994), by adopting much of the print paradigm, and by rejecting *Red Lion*, we adopted with it a considerable body of precedent that governs the respective First Amendment rights of competing speakers. . . . Drawing an analogy to the print media, for example, the author of a book is protected in writing the book, but has no right to have the book sold in a particular bookstore without the storeowners consent. Nor can government force the editor of a collection of essays to print other essays on the same subject.

518 U.S. at 816 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., concurring in the judgment in part and dissenting in part).

As Justice Thomas also explained in *Denver*, 518 U.S. at 815, this Court appeared to support a similar position in *Turner*, when it wrote:

> The broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitation that characterizes the broadcast medium. . . . At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas or

> beliefs deserving of expression, consideration and adherence. Our political system and cultural life rest upon this ideal.

Turner, 512 U.S. at 638-39.

If print is to become the preferred analogy selected for cable, it would seem obvious that print would also be the correct analogy for cyberspace. Indeed, it would be illogical to assimilate the Internet to a broadcast model if such a model was not used for cable, which is far more similar to broadcast television than the Internet. "The weight of opinion at the moment seems to have shifted toward adopting a unitary print media model for the entire mass media." Lee C. Bollinger, *Images of a Free Press* 86 (1991) (discussing *Columbia Broadcasting Sys. v. F.C.C.*, 453 U.S. 367 (1981) (Fairness Doctrine case analogizing broadcasters to print journalists)).

Even the government has used a similar analogy when referring to content on the Internet. In the Joint Stipulation of Uncontested Facts submitted during the challenge to the constitutionality of the Child Online Protection Act ("COPA") in *ACLU v. Reno*, 31 F. Supp. 2d 473, the government agreed that, "[w]hen information is made available, it is said to be "*published*" on the Web." *Id.* at 483 (emphasis added).

A major advantage of the analogy to print is that it forces legislators and judges to focus on the First Amendment's protective goals, rather than losing sight of them in a fruitless analysis of technological distinctions without a difference. As Professor Tribe concluded: "[T]he Constitution's norms, at their deepest level, must be invariant under merely technological transformations." Laurence Tribe, *The Constitution in Cyberspace*. Adoption of a print analogy will avoid the differential treatment of the same text in print and electronic versions.

Filtering software routinely blocks content that no librarian would remove from a shelf. For example, the Smartfilter product installed in libraries in Utah was found to have blocked The Adventures of Sherlock Holmes, A Connecticut Yankee in King Arthur's Court, all of Shakespeare's plays and even The Declaration of Independence, George Washington's Farewell Address, The United States Constitution, The Mayflower Compact and The Bible. *See Censored Internet Access in Utah Public Schools and Libraries*, at http://censorware.net/reports/utah/main.html. Analogizing Internet content to print media for purposes of First Amendment treatment clearly mandates affirmation of the result below; that filtering software is not "narrowly tailored" and should not be used in libraries.

Only by treating the Internet as analogous to print media will this Court ensure the full applicability of the First Amendment in the 21st Century. It is an imaginable, even a likely outcome, that someday information presented on paper will constitute merely a small percentage of all the available information, with the rest stored in electronic format on the Internet and associated networks. Only by extending to the Internet the full protections of the First Amendment established for print will this Court ensure that the same information, whether in electronic or paper form, will receive consistent treatment.

Therefore, the *amicus* argues that "[t]he Internet, for free speech purposes, should be regarded as a constellation of printing presses and bookstores." Jonathan Wallace & Michael Green, *Bridging The Analogy Gap: The Internet, The Printing Press and Freedom of Speech*, 20 Seattle U.L. Rev. 711, 746 (citing Jonathan Wallace and Mark Mangan, *Sex, Laws & Cyberspace*, 228). To this end, the *amicus* urges the Court to take the position set forth by Judge Dalzell in his opinion in the *ACLU v. Reno* case:

> My examination of the special characteristics of Internet communication, and review of

> the Supreme Court's medium-specific First Amendment jurisprudence, lead me to conclude that the Internet deserves the broadest possible protection from government imposed, content based regulation. If "the First Amendment erects a virtually insurmountable barrier between government and the print media," . . . even though the print medium fails to achieve the hoped for diversity in the marketplace of ideas, then that "insurmountable barrier" must also exist for a medium that *succeeds* in achieving that diversity.

ACLU v. Reno, 929 F. Supp. at 881 (citations omitted).

CONCLUSION

In conclusion, this case provides an opportunity for this Court to create uniformity from inconsistency and order from confusion. We respectfully urge this Court to accomplish this task by finding that, for First Amendment purposes, *print* is the proper analogy for the Internet.

Respectfully submitted,

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FOR ARGUMENT

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In the Supreme Court of the United States

UNITED STATES OF AMERICA, Appellant

v.

AMERICAN LIBRARY ASSOCIATION, et al., Appellees

On Appeal From the U.S. District Court
for the Eastern District of Pennsylvania

BRIEF *AMICI CURIAE* OF PARTNERSHIP FOR PROGRESS ON THE DIGITAL DIVIDE, THE GAY LESBIAN STRAIGHT EDUCATION NETWORK, HARLEM LIVE, PACIFIC NEWS SERVICE, PEACEFIRE, ROCK OUT CENSORSHIP, TRUCE, and WIRETAP MAGAZINE, IN SUPPORT OF APPELLEES

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40 pp

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INTEREST OF *AMICI CURIAE*

The *amici curiae* are organizations working to bridge the digital divide – the gaps in access, content, skills, and training that thwart effective use of information technologies and services which are essential to full participation in today's digital age democracy. *Amici* are concerned that CIPA, by mandating Internet filters in public libraries, worsens the digital divide and as a result relegates many Americans to second-class information citizenship. They file this brief in order to assist the Court in evaluating the constitutionality of CIPA's filtering mandate.[1]

SUMMARY OF ARGUMENT

I. From a luxury enjoyed by the few, access to the Internet has today become essential to citizens' ability to communicate, gather information, and participate in democratic life. Yet many Americans, including lower-income citizens, the elderly, the disabled, residents of rural areas, those with limited English skills, and other minorities, remain at a disadvantage. Some of them lack Internet access at home, school, or work. Others lack the skills and training needed to use the Internet effectively. In many cases, they are subject to both disadvantages simultaneously. Public libraries have played a major role in narrowing these gaps and hence bridging the digital divide.

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed pursuant to Rule 37.3 of the Rules of this Court. No part of this brief was written or financed by any party or by any person or entity other than the *amici*. See the appendix for a description of the *amici*.

II. CIPA's mandate of filtering in libraries that receive federal aid for Internet connections threatens to undo these gains. As the district court found, Internet filters, even at their least restrictive settings, block tens of thousands of valuable, non-pornographic Web pages. For Americans who rely on the Internet at libraries for job searches, health information, continuing education, and many other needs, CIPA thus has particularly harsh consequences.

Filters also obstruct online communication that has become essential to democracy. As a result, they undermine public libraries' core functions as information providers and as conduits for participation in democratic life.

III. Because Internet access at public libraries creates a public forum, the district court correctly applied First Amendment strict scrutiny to CIPA. But even under rational basis review, the law is unconstitutional. The irrational operation of key word-based filtering, the secret and discretionary nature of filtering companies' decision-making, and the inevitable blocking of numerous useful, non-pornographic Web sites, render CIPA particularly irrational in its impact on those Americans who are on the underside of the digital divide.

ARGUMENT

I DIGITAL TECHNOLOGY HAS GIVEN RISE TO A "DIGITAL DIVIDE" THAT PUTS A NUMBER OF DEMOGRAPHIC GROUPS AT A SERIOUS DISADVANTAGE IN ACCESSING THE INCREASINGLY ESSENTIAL RESOURCE OF THE INTERNET

A. *The Internet is Now Essential to Participatory Citizen Discourse, Job Searching, Obtaining Health Information, Learning About Government Programs, and Day-to-Day Research on Many Other Topics*

The Internet has grown exponentially in the last decade. It has changed the way Americans communicate with each other, gather essential information, and participate in the democratic process. As this Court has said, the Internet is a "vast democratic forum," with content "as diverse as human thought." *Reno v. ACLU*, 521 U.S. 844, 868, 870 (1997).

The district court found that as of September 2001, there were approximately eleven million World Wide Web sites, containing about two billion separate Web pages. J.S. App. 30a. Contained within this vast resource is information on many important topics: government programs and policies; job searches and careers; educational and training opportunities; health (including vital information on sexual health); religion and services available from religious organizations; history, literature, art, and music; translations of information that are especially useful to Hispanic Americans and other language minorities; interactive sites that advance participatory democracy; and sites providing commercial information about products and services.

Much of this information is simply not available off-line. The Colorado Department of Education has pointed out that in some cases the Internet is now the *only* point of access to "a wide variety of government services, educational materials, health resources, communication tools and commercial activities." Hence, it becomes ever more important "to ensure equal access to information for all segments of society."[2]

As the National Telecommunications and Information Administration recently concluded: "We are approaching the point where not having access to these tools is likely to put an individual at a competitive disadvantage and in a position of being less than a full participant in the digital economy."[3] In its 2002 report on the digital divide, the Consumers Union concurred: "Being disconnected means being disadvantaged and disenfranchised. Being connected is essential to education, public health, [and] public safety."[4]

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[2] Tammi Moe & Keith Curry Lance, *Colorado Public Libraries and the "Digital Divide," 2002* 1 (Library Research Serv., Colorado State Library, Colorado Dep't of Education, Oct. 2002). In addition, e-mail is now a primary means of daily communication. Not having an E-mail address puts an individual at a serious disadvantage in economic, social, and political life.

[3] NTIA, *Falling Through the Net: Toward Digital Inclusion* xviii (U.S. Dep't of Commerce, Oct. 2000) (ALA Pl. Ex. 40); see also *United States v. Sofsky*, 287 F.3d 122, 125 (2d Cir. 2002) ("[c]omputers and Internet access have become virtually indispensable in the modern world of communications and information gathering"; hence, probation condition barring all Internet use was unreasonable).

[4] Mark Cooper, *Does The Digital Divide Still Exist?* 8 (Consumers Union, May 30, 2002).

B. *Lower-Income People, the Elderly, the Disabled, Those Living in Rural Areas, Those With Limited English Skills, and Other Demographic Groups Lack Full Access to the Internet or the Skills and Training to Use It, But Public Libraries Have Helped Bridge the Gap*

1. The Scope of the Digital Divide

The digital divide affects lower-income citizens, the elderly, the disabled, people living in rural areas, those with limited English skills, and other demographic groups. Although progress has been made – in large part thanks to public libraries – in getting these citizens online and giving them the skills needed to take advantage of information technology, there is still a large gap, and in fact, the digital divide has been growing.

Between July 1995 and February 2002, the National Telecommunications and Information Administration (NTIA), a branch of the U.S. Department of Commerce, documented the digital divide in five separate reports. In the first report, in 1995, the NTIA noted that those lacking access to the Internet were disproportionately lower-income citizens living in both rural areas and central cities. In terms of age, senior citizens (55 years and older) in rural areas had the lowest ownership of computers. Rural African Americans had the lowest computer-use rates. Yet minorities surpassed Whites in the percentage who used the Internet to search classified ads, take courses, and access government reports.[5]

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[5] NTIA, *Falling Through the Net: A Survey of the "Have Nots" in Rural and Urban America* (U.S. Dep't of Commerce, July 1995), § I.

The NTIA's second report, in 1998, found that while computer use had increased nationwide, there was still a significant digital divide "based on race, income, and other demographic characteristics." In fact, there was now an even greater disparity than in 1995 between upper and lower-income groups. There was also a marked age disparity, with only 20% of those aged 55 and older having access to a computer at home (and only about 7% having Internet access), compared to nearly 50% computer penetration and 25% online access for those aged 35-44.[6]

The NTIA found these disparities to present a serious public-policy concern, since lower-income Americans are the ones who most need the Internet "to find jobs, housing, and other services." The report concluded that because it would take time before citizens in these groups are connected at home, it was essential that schools, libraries, and other community access centers make the Internet available.[7]

The third report, published in 1999, told much the same story. Internet access had again increased, but the digital divide had widened. "Minorities, low-income persons, the less educated, and children of single-parent households, particularly when they reside in rural areas or central cities, are among the groups that lack access to information

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[6] NTIA, *Falling Through the Net II: New Data on the Digital Divide* (U.S. Dep't of Commerce, July 1998), § III; charts 16, 22. The NTIA used nine separate household income categories, ranging from under $5,000 to over $75,000. Almost ⅓ of the U.S. population has a household income below $25,000. U.S. Census Bureau, *Current Population Survey* (Aug. 2000), Table A-1; *Does the Digital Divide Still Exist?*, *supra* n.4, at 4.

[7] *Falling Through the Net II*, *supra* n.6, § IV.

resources." At the same time, though, some of those who lacked access at home or work were "using the Internet at public facilities, including schools and libraries," and "in ways that will help them advance economically and professionally."[8]

In its fourth, October 2000 report, the NTIA documented gains in Internet access among many groups affected by the digital divide. It found that there were now 116.5 million Americans online "at some location," 31.9 million more than there were only 20 months earlier. The increase occurred among all groups, with former digital "have nots" now "making dramatic gains." In rural areas, for example, 38.9% of households now had access, a 75% increase from 1998. Internet access in African American households rose from 11.2% to 23.5%.[9]

Nevertheless, the digital divide remained, and had again expanded in some cases. People over age 50 continued to have the lowest rate of Internet use (with the exception of young children). Those with disabilities were only half as likely as the rest of the population to live in homes with Internet access; and close to 60% of them had never used a computer. The difference between access rates for African

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[8] NTIA, *Falling Through the Net: Defining the Digital Divide* (U.S. Dep't of Commerce, July 1999), Introduction. The report noted that urban households with incomes of $75,000 and higher were more than 20 times more likely to have Internet access than rural households at the lowest income levels. Within the low-income population, those living in rural areas were only half as likely to have access as those with the same income in urban areas. *Id.*, Executive Summary.

[9] *Falling Through the Net: Toward Digital Inclusion*, *supra* n.3, Introduction.

American households and the national average had widened (23.5% penetration rate for African Americans compared to 41.5% for households generally). The same was true for Hispanic households. While about a third of Americans used the Internet at home, only 16.1% of Hispanics and 18.9% of African Americans did so.[10]

On the other hand, the NTIA reported that many of those disadvantaged by the digital divide *were* making important use of the Internet. Low-income individuals "were the most likely to report using the Internet to look for jobs." And libraries were providing a critical means of access. The unemployed, African Americans, Asian Americans, and Pacific Islanders were "far more likely" than others to access the Internet at public libraries.[11]

The NTIA's most recent report again showed that despite increased Internet use overall, the digital divide was growing. Between 1997 and 2001, the gap between individuals aged 25-49 and those over 50 using the Internet had increased from 15.9% to 26.8%. The disparity in Internet use between employed and unemployed citizens rose from 35.3% to 53.9%. And the gap between Whites and Hispanic

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[10] *Id.* at Introduction, 41, 61. A study by the Children's Partnership at about the same time noted other barriers: an estimated 87% of documents on the Internet are in English, although "at least 32 million Americans speak a language other than English as their primary language." Children's Partnership, *Online Content for Low-Income and Underserved Americans: The Digital Divide's New Frontier* 8 (Mar. 2000).

[11] *Falling Through the Net: Toward Digital Inclusion, supra* n.3, at xviii.

Americans went from 14.3% to 28.3%.[12]

Yet the importance of the Internet, and of libraries in providing access, also became more evident. Twenty-three percent of Internet users with household incomes under $15,000 went online to search for jobs, compared to only 14.6% of those with household incomes over $75,000. Ten percent of Internet users overall went online at public libraries, but 18.7% of African American Internet users and 13.8% of Hispanic Internet users did so. Among racial and ethnic groups, 12.7% of Whites, 19.4% of African Americans, and 16.0% of Hispanics using the Internet at libraries did not also access the Internet from home, work or school.[13]

2. <u>The Role of Libraries</u>

Public libraries have played a critical role in ameliorating the harsh consequences of the digital divide. Between 1998-2000, libraries in all communities – high and low income; urban, suburban, and rural – expanded Internet access. In low-income areas, access at libraries increased from about 76% to about 94%. And critically important, access was frequently accompanied by librarian assistance, skills

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[12] NTIA, *A Nation Online: How Americans Are Expanding Their Use of the Internet* 26 (U.S. Dep't of Commerce, Feb. 2002) (ALA Pl. Ex. 56). See also Leslie Harris & Associates, *Bringing a Nation Online: The Importance of Federal Leadership* 3 (July 2002) (report for the Leadership Conference on Civil Rights and the Benton Foundation) (despite progress, the digital divide remains an obstacle, so that for many Americans, "the enormous social, civic, educational and economic opportunities offered by rapid advances in information technology remain out of reach").

[13] *A Nation Online, supra* n.12, at 34, 40.

training, and provision of special hardware or software for those with disabilities.[14]

For example, by 2000, 62.3% of libraries offered Internet training.[15] A 2002 survey by the Colorado Department of Education found that 59% of library patrons felt they had improved their online skills through using library computers; the number was ⅔ for minority respondents. People aged 55 and over were three times as likely to learn new technology skills through a library course than any other age group, and twice as likely to do so with staff assistance. The report concluded:

> The technology *have-nots* are not just the poor and under-educated. People from all walks of life rely on the Internet access provided by public libraries. This survey shows that library patrons are teaching themselves new technology skills, communicating on a global level, and accessing online information regarding education, health, employment, and volunteer opportunities. As a result, they are able to improve their personal quality of life and that of their communities.[16]

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[14] John Carlo Bertot & Charles McClure, *Public Libraries and the Internet 2000: Summary Findings and Data Tables* 3, 17, 20 (Information Use Management & Policy Institute, Florida State U., Sept. 2000) (ALA Pl. Ex. 37).

[15] *Id.* at 20.

[16] Moe & Lance, *supra* n.2, at 6-8, iii. With respect to age, the report noted that libraries "provide the only Internet access for a substantial portion of every age group. Older patrons with less computer experience rely on Internet access through public libraries, staff assistance and library courses more than any other

Another report in 2002 found that those relying on libraries for information technology benefitted in numerous ways, among them developing basic literacy skills, obtaining consumer advice, and accessing state, local, and federal government information. They not only conducted job searches but prepared cover letters and resumés at the library, and added "basic computer and Internet skills to their resumés so as to be more marketable." Migrants and summer help "were trained to used the Internet at the library in several locations in cooperative programs with local or state governments."[17]

In sum, the environment created through Internet access in public libraries is essential to bridging the digital divide for reasons beyond mere access. As the Children's Partnership reported: "oftentimes residents in low-income communities use a neighborhood technology program [which includes library programs] even if they have a computer and Internet access at home." This is because community-based technology programs provide "a helpful and familiar

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group. This might suggest that people over 55 use public library technology more than any other age group because of the help available." *Id.* at 19. The report also found that 44% of respondents looking for educational programs on library computers had annual incomes under $19,000; 29% using public library terminals for distance education were below poverty level; 35% of those looking for jobs online at libraries were below poverty level; and 28% of those seeking information on social programs were below poverty level. *Id.* at 24-25.

[17] Charles McClure *et al.*, *Public Library Internet Services and the Digital Divide: The Role and Impacts From Selected External Funding Sources* 73-76 (Information Use Management & Policy Institute, Florida State U., Jan. 2002) (ALA Pl. Ex. 87).

atmosphere and the chance to learn new things and ask staff for coaching when they have trouble."[18]

All of these gains have been due in no small part to the LSTA and E-rate programs. One of the LSTA's goals is to target information services to under-served, rural, and low-income communities. 20 U.S.C. § 9141(a). Similarly, E-rate discounts for eligible libraries range from 20% to 90%, depending on the level of economic disadvantage in their communities, and their location (urban or rural). J.S. App. 15a; Michael Puma *et al.*, *The Integrated Studies of Educational Technology: A Formative Evaluation of the E-Rate Program* 7-8 (Urban Institute, Oct. 2002). As the district court found, about 70% of libraries serving very low-income areas receive E-rate discounts. J.S. App. 36a-37a.

But it is also important to note that libraries in communities ranging across the demographic spectrum receive assistance from the LSTA and E-rate programs. They use or leverage these funds to provide not only Internet connections, but also technical support, skills training, special screens for the visually impaired, and other aids to the disabled.[19] Thus, the E-rate has not only "provided a partial

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[18] Children's Partnership, *Online Content for Low-Income and Underserved Americans: An Issue Brief by the Children's Partnership* 7 (2002).

[19] On the importance of the E-rate in enabling libraries to leverage funds, see McClure *et al.*, *supra* n.17, at 97-101; Urban Institute, *E-Rate and the Digital Divide: A Preliminary Analysis From the Integrated Studies of Educational Technology* 19 (U.S. Dep't of Education, 2000) (by giving public libraries "access to affordable telecommunications and advanced digital technologies," the E-rate "expands their technology capacity, and by freeing up resources that would have otherwise been spent on tele-

'financial bridge' across the digital divide separating the poor, minorities, and geographically isolated from equitable access to computers and the Internet."[20] It has provided Internet access for all Americans who use libraries, including older and disabled Americans who are on the underside of the digital divide.

As the district court concluded:

> Public libraries play an important role in providing Internet access to citizens who would not otherwise possess it. Of the 143 million Americans using the Internet, approximately 10% or 14.3 million people, access the Internet at a public library. ... By providing Internet access to millions of Americans to whom such access would otherwise be unavailable, public libraries play a critical role in bridging the digital divide separating those with access to new information technologies from those that lack access [and thus] ... greatly expand the educational opportunities for millions of Americans.

J.S. App. 36a, 130a.

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communication expenses, allows scarce resources to be used to support other aspects of needed technology infrastructure, especially the critically important area of staff professional development").

[20] Puma *et al.*, *supra* p.12, at 20.

II INTERNET FILTERS UNDERMINE THE PROGRESS THAT LIBRARIES HAVE MADE IN BRIDGING THE GAP AMONG DEMOGRAPHIC GROUPS, AND HENCE EXACERBATE THE DIGITAL DIVIDE

A. *Filters by Their Nature, and Even at Their Most "Minimal" Settings, Block Large Amounts of Valuable, Non-Pornographic Information*

As the district court found, Internet filters block access to tens of thousands of valuable, non-pornographic Web pages on a host of subjects ranging from religion to medicine. The problem stems from the nature of filtering technology, and hence cannot be cured by "improvements" in the computer programs that filtering companies use to compile their blacklists.

The fundamental problem with Internet filtering is that it assumes human expression can be categorized based on "artificial intelligence" (*i.e*, key words and phrases). As expert witness Geoffrey Nunberg explained, there are some tasks that computers simply cannot do, "both because they involve subjective judgments and because they rest on a broad background of human knowledge and experience that computers cannot easily acquire." Expert Report of Geoffrey Nunberg, ALA Pl. Ex. 70, at 78; see also J.S. App. 59a ("artificial intelligence" text classification systems are inherently "unable to grasp many distinctions between types of content that would be obvious to a human").

Although filtering companies claim that their employees review most Internet sites before they are blocked, this is belied, as the district court found, by the nature of the Web and the operation of filters. Human review of even a fraction of sites is impossible, given the size of the Internet and the

fact that millions of Web pages change every day. Hence, blocking relies primarily on mechanical key words and phrases that cannot possibly evaluate context or style, no less such subjective factors as "patent offensiveness" or "serious value" – both, of course, elements of this Court's obscenity test. As the district court found, often whole sites are blocked when only one page is even arguably problematic; and filtering companies maintain their codes and blacklists as secret, proprietary information. J.S. App. 48a-65a.

The court gave numerous examples of the tens of thousands of sites erroneously blocked by filters, even at their least restrictive settings. In some instances, the errors were the result of deliberate miscategorization; in others, the result of overzealousness by company employees; and in most, simply a consequence of the mechanical nature of the filtering process. Many of the blocked sites have particular importance for citizens who are disadvantaged by the digital divide and who depend on libraries for Internet access.

Examples included:

- **Health sites**, including a guide to allergies, blocked by the Bess filter as "adults only/ pornography"; a health Q&A site sponsored by Columbia University, blocked by Bess as "sex" and by SmartFilter as "mature"; a disability home page, blocked by Bess as "pornography"; and a cancer treatment center, blocked by Websense as "sex."[21]

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[21] See also Peacefire's documentation of Cyber Patrol's blocking of the American Cancer Society site (peacefire.org/censorware/Cyber_Patrol/caps/cancer.org.blocked-1-6-2002.gif), and Websense's blocking (as "sex") of the site KinderGarten.org, an organization funding free vaccinations for children in India.

- **Political sites**, including one for a libertarian candidate, another for a local selectman, and another for Wisconsin Right to Life – all blocked by Bess as "nudity"; a site opposing the death penalty, blocked by Bess as "pornography"; and a site on Uganda, blocked by Bess as "adults only/pornography."

- **Job search, education, and career sites**, including one for social workers and another involving home schooling, both blocked by Cyber Patrol as "adult/ sexually explicit"; a site encouraging local business to develop relationships with the gay community, blocked by Bess as "adults only/pornography"; and a site for aspiring dentists, blocked by Cyber Patrol as "adult/sexually explicit."

- **Religious sites**, including the Knights of Columbus, blocked by Cyber Patrol as "adult/sexually explicit"; the Lesbian and Gay Havurah of Long Beach, California, blocked by Bess as "adults only/ pornography" and by SmartFilter and Websense as "sex"; a site that sells religious wall hangings, blocked by Websense as "sex"; and a Christian orphanage, blocked by Cyber Patrol as "adult/sexually explicit."

J.S. App. 86a-89a, 155a.[22]

(peacefire.org/censorware/WebSENSE/caps/kindergarten-org-blocked-sex.11-26-2001.html).

[22] There are countless other examples: "humpback" whales; "magna *cum* laude"; "*pussy* willows"; Dr. Everett Koop's health site (blocked as "glamor and intimate apparel"); and the site titled "penismightier." See ALA Pl. Ex. 70, at 71, 72; Trial Testimony of E. Rood, J.A. 227; Free Expression Policy Project, *Internet*

The irrationality of filtering technology is compounded by evidence of deliberate viewpoint-based blocking. Geoffrey Nunberg described the criteria that filtering companies use based upon their "target markets and their overall philosophy," their systematic blocking of sites related to sexual health, and their "well-documented" practice of invoking the "sex" category to block sites critical of the filtering company. ALA Pl. Ex. 70, at 39-40, 74-75; see also Trial Testimony of Christopher Hunter, Mar. 26, 2002, at 238, 258-59 (describing blocking of sites critical of filtering, or of Internet censorship generally); E. Rood Testimony, J.A. 230 (blocking of gay and lesbian sites); Appendix to Expert Report of Christopher Hunter, ALA Pl. Ex. 85, at 36 ("[i]n examining the blocking decisions of filter makers, their political biases become readily apparent").

The breadth, unfettered discretion, and frequent irrationality of Internet filtering cannot be overstated. Describing mistakes in terms of percentages tends to mask the problem: as Nunberg explained, even a 2% error rate means wrongly blocking about 40 million innocent Web pages. ALA Pl. Ex. 70, at 84.[23] Entire news and commentary sites such as Salon.com are blocked. Translation sites that convert works from English to other languages, and thus are of great value to Hispanic Americans

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Filters: A Public Policy Report 22, 44 (2001), www.fepproject.org/policyreports/filteringreport.pdf

[23] Despite the claims of filtering companies, their actual error rates, to the extent they can be determined at all given the subjectivity of blocking categories, are well above 2%. As the district court noted, even the government's expert found that 6-15% of the blocked sites that he analyzed "did not contain content that meets even the filtering products' own definitions of sexually explicit content, let alone CIPA's definitions." J.S. App. 91a.

with limited English skills as well as many other language minorities, are blocked wholesale because the filtering companies believe their host sites might be used to circumvent filtering. Vital health information about safer sex and pregnancy prevention is routinely and deliberately blocked, as are sites (not sexually explicit) that are important to gay men and lesbians. All filters, including the three most used by libraries, censor thousands of useful Web sites that have nothing to do with pornography. J.S. App. 48a-94a.

The LSTA and E-rate programs were both in part intended to bridge the digital divide by helping library patrons access the Internet. Requiring filters on library computers undermines that goal by relegating those who rely on libraries to second-class Internet access. As a consequence, CIPA undermines their ability not only to communicate via the increasingly important mechanism of e-mail, but to find needed information about health, jobs, civil rights, politics, and many other topics.

B. *Filters Obstruct the Process of Communication Central to a Participatory Democracy*

The importance of access to information in a constitutional democracy cannot be overstated. As James Madison recognized, the ability to acquire uncensored information is essential for citizens' constitutional participation:

> A popular Government, without popular information, or means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

9 *Writings of James Madison* 103 (Gaillard Hunt ed.) (NY: Putnam's, 1910). Hence, the right to receive information, which is the value most implicated by CIPA's restrictions on library patrons, is the foundation of the process of communication central to a democracy.

In numerous contexts, this Court has wisely recognized the importance of the right to receive information and ideas. See, *e.g., Reno v. ACLU,* 521 U.S. at 874; *Board of Education v. Pico*, 457 U.S. 853, 867 (1982); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972); *Lamont v. Postmaster General,* 381 U.S. 301, 308 (1965) (Brennan, J., concurring); *Martin v. Struthers*, 319 U.S. 141, 143 (1943). The reason is simple: without unfettered access to expression, there can be no democratic discussion and debate. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978). And in carrying on this debate, "it is not the right of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind ... In this field every person must be his own watchman for truth." *Thomas v. Collins*, 323 U.S. 516, 545 (1945).[24] The irrational constraints that filters place on library patrons' participation in the communication process are inconsistent with this Court's affirmation of the First Amendment right to receive information and ideas.

This Court's recognition that freedom to speak and freedom to hear are inseparable is substantiated by the trans-actional model of communication used by scholars in the

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[24] See also George Lakoff & Mark Johnson, *Metaphors We Live By* 10-13 (Chicago: U. of Chicago Press, 1980); Mary Elizabeth Bezanson, "Two Sides of the Same Coin: Evolution of the Right to Receive," in 28 *Free Speech Yearbook* 81 (1990).

communication discipline.[25] The model, which describes the process of communication, includes the sender, receiver, channel, message, and noise, another important concept implicated by CIPA.

Noise refers to anything that interferes with the reception of a message or frustrates communication. For example, a radio turned up very loud might make it impossible for two people to carry on a conversation, or a reader might not be able to locate needed information if pages are missing from a book. In those cases, the receiver can compensate for the noise by turning down the volume of the radio or getting another copy of the book. In contrast, filters present a particularly insidious and insurmountable obstacle for Internet communication – filters are hidden noise. Because filters present only "approved" Web sites and block all other information, the receiver does not know that there is any information missing or what it might be. As a result, a library patron conducting a search for information, who has no choice but to use a filtered Internet terminal, would have no opportunity to compensate for the obstruction to the process of communication caused by CIPA-mandated filters; the patron would be left with only a warped version of the knowledge sought and would not even be aware of that fact.

The protection of access to the ideas of others through the public library, even access to ideas with which the majority may sharply disagree, is a paramount concern for the future of America in the digital age. As Alexander Meiklejohn wrote:

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[25] See, *e.g.*, Dean C. Barnlund, "A Transactional Model of Communication," in *Foundations of Communication Theory* 83-102 (Kenneth K. Sereno & C. David Mortensen, eds.) (NY: Harper & Row, 1970).

> When men govern themselves, it is they – and no one else – who must pass judgment upon unwisdom and unfairness and danger. ... Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.*

Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* 26 (NY: Harper & Brothers, 1948).

Libraries of this nation, and the Internet access they provide, must remain free from government or corporate decisions about the acceptability of ideas. Without such freedom, the process of communication central to a participatory democracy will be irreparably harmed.

C. *Filters Undermine the Core Functions of Libraries in a Democracy, With Especially Harsh Consequences For Those Already Harmed By the Digital Divide*

From equal access to the free flow of information, libraries embody democracy and the values shared by American citizens. As one participant in a recent study explained, "I think as we are seeing the population . . . stratifying along class lines in a huge way . . . the library is one of those symbolic things that is left, that is a cornerstone of 'we all do this for everyone' so that everyone can use it." Benton Foundation, *Buildings, Books, and Bytes: Libraries and Communities in the Digital Age* (Nov. 1996), reprinted

in 46 *Library Trends* 178, 204 (Summer 1997).

Federal support for libraries has a long and successful history, beginning with support for bringing libraries to rural communities, then assisting disadvantaged communities, encouraging diversity, building and renovating facilities, providing job information centers, and fostering literacy. See Kathleen Molz & Phyllis Dain, *Civic Space/Cyberspace: The American Public Library in the Digital Age* 89-122 (Cambridge, MA: MIT Press, 1999). In today's digital age, when the Internet is the locus of citizenship and individual success in modern civil society, libraries, with the necessary assistance of federal funding, continue to play a pivotal role as an information commons, empowering communities to utilize new technologies.

The digital divide is not just about who has access to new information technology. It also involves producing online content relevant to people's lives, creating motivation for people to learn, training to teach skills, and cultivating 21st century literacy. While E-rate and LSTA funding, which promote access, help pave the road to the Information Superhighway, public libraries add crucial value to that funding by serving the public's needs beyond mere access, and by leveraging federal support as a catalyst for substantial additional funding from state, local, and private sources.

The information technology access that public libraries provide for patrons with the assistance of E-rate and LSTA funding is indispensable. Libraries, which in the past supplied links to information available beyond their own collections through interlibrary loan, now provide vital links to information through cyberspace. Consider that approximately 17.5 million Americans lack telephones in

their homes, let alone computers and Internet access.[26] Public library Internet access spans all demographic groups and fulfills an essential patron need.

Employing the information technology access that federal funding allows, public libraries serve additional core functions that further empower all Americans in the digital age. In terms of traditional, basic literacy, an estimated 44 million American adults do not have the reading and writing skills necessary for functioning in everyday life.[27] The Internet is an important resource that libraries use to teach literacy skills: "'When people come in [to the library] who can't read, we encourage them to go to the Web and go to sites that contain many pictures.'"[28] Indeed, according to one

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[26] See U.S. Census Bureau, *Statistical Abstract of the U.S.: 2001* 50 (Jan. 2002); "Telephone Penetration In The United States, 1983-2000," in Federal Communications Comm'n, *Statistics of Communications Common Carriers* 228 (2000/01 ed.) (Sept. 2001); Jorge Reina Schement, "What Jefferson Knew and de Tocqueville Saw: Libraries Measuring the Digital Divide," paper presented at "The Digital Divide's Multiple Dimensions" Public Policy Roundtable, Pacific Bell/UCLA Initiative for 21st Century Literacies 3 (Aug. 2-5, 2002) ("[a]pproximately seven million American households lack telephone service. At an average of 2.5 persons per household, that leaves 17.5 million individuals unconnected to the most basic telecommunications technology").

[27] National Center for Education Statistics, *National Adult Literacy Survey*, Introduction (1992), novel.nifl.gov/nifl/facts/NALS.html. Literacy experts define a functional literacy level as, for example, being able to locate an intersection on a street map or calculate the costs of a purchase from an order form. *Id.*

[28] Martha Shimmers, Librarian, quoted in Children's Partnership, *Online Content for Low-Income and Underserved Americans: The Digital Divide's New Frontier* 16 (Mar. 2000).

scholar, computers allow the mastery of knowledge that was previously inaccessible, and foster an unprecedented diversity of learning styles and self-directed work.[29]

In the digital age, public libraries are the primary civic institutions entrusted with the responsibility to teach and promote the new expanded literacy demanded by the information society. In fact, as the amount and choices of information have multiplied, libraries have become more key, and patrons have a greater need for the services, training, and skills that libraries teach. These skills extend beyond the traditional reading, writing, math, and science. They now include technology literacy, information literacy, social competence and responsibility, and much more.[30]

This new concept of literacy is presenting formidable challenges for education, the workplace, and civic engagement, but the basic values of librarianship applied to the digital age with the support of federal funding allow public libraries to help individuals effectively use the tools of the Internet to participate fully in contemporary American life. For individuals who have lower skill levels, less income, limited English proficiency, or disabilities, or who face other challenges, Internet access in public libraries is an even more crucial resource.

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[29] Seymour Papert, *The Children's Machine: Rethinking School in the Age of the Computer* (NY: Basic Books, 1993).

[30] On the aspects of literacy in today's electronic and digital world, see White Paper to the 21st Century Literacy Summit, *21st Century Literacy in a Convergent Media World* 4 (Mar. 2002), www.21stcenturyliteracy.org/white/

Thus, the nexus of Internet access and public libraries is the meeting place of democracy, equity, and access to information and knowledge in 21st century America. Without unfettered Internet access, patrons would be deprived of the most basic functions of modern libraries. The unique qualities of Internet access in public libraries hold a special importance in life in the digital age – library Internet access is essential in helping citizens bridge the digital divide in terms of connectivity, content, and skills, and in fostering independence, freedom of thought, good judgment, and responsibility.

Imposing filters on this resource through CIPA undermines the ability of libraries to teach and patrons to develop these democratic values. Indeed, the notion that privileged citizens who have information access without the use of public facilities can choose whether or not to use filters, while those dependent on government-funded information access have no choice, is inimical to the nature of democracy.

Further, by suggesting that citizens must find an alternative means to access the information they are denied through a filtered public library computer, CIPA may well be unintentionally cultivating a climate that socializes and conditions the uncritical acceptance of restrictions on debate in public forums which are the foundation of democratic deliberation.[31] If the majority of libraries across America are forced to choose between remaining true to their mission as public information gateways or acting as the agents of private

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[31] See Susan B. Kretchmer, "The Library Internet Access Controversy and Democracy," in *Libraries and Democracy: The Cornerstones of Liberty* (Nancy Kranich, ed.) (Chicago: American Library Association, 2001).

corporate information gatekeepers, and are forced to choose between maintaining current levels of services or slashing those services as a result of forgoing E-Rate and LSTA funding, the ultimate harm will be to America's information-disenfranchised citizenry and to democracy.

III CIPA'S MANDATE OF INTERNET FILTERS AS A CONDITION OF LSTA OR E-RATE FUNDING VIOLATES THE FIRST AMENDMENT RIGHTS OF ALL LIBRARY USERS, ESPECIALLY THOSE ON THE UNDERSIDE OF THE DIGITAL DIVIDE

A. *The District Court Correctly Found that the Internet is a Public Forum; Hence, It Appropriately Applied Strict Scrutiny to CIPA*

The Internet is not only an essential resource in today's world; it is an encyclopedic one, providing information, ideas, and opportunities for communication on every conceivable topic. Thus, as the district court found, even when filtered, Internet access at public libraries possesses the quintessentia' characteristics of a public forum. Under this Court's precedents, CIPA's content-based restrictions on Internet access are therefore subject to strict First Amendment scrutiny.

This conclusion is reinforced by the fact that CIPA imposes restrictions on libraries. Like universities and public fora, libraries are in the business of free expression. Their core function is to provide "a diversity of views from private speakers." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 834 (1995).[32] Libraries play a critical

[32] See also *Rust v. Sullivan*, 500 U.S. 173, 200 (1991) (like a public forum, a university is "a traditional sphere of free

role in providing a wide range of information to citizens, including those disadvantaged by the digital divide. Libraries have helped introduce generations of underprivileged Americans into democratic life.

Restricting communication that benefits a disadvantaged population also creates serious First Amendment problems because the disadvantaged group is unlikely to find alternative means of access. Thus, as the district court perceived, CIPA's restrictions resemble those struck down in *Legal Services Corp. v. Velazquez,* 531 U.S. 533 (2001). This Court in *Velazquez* recognized that a content-based restriction on the speech that legal services lawyers could engage in on behalf of their low-income clients imposed particular burdens because the clients were unlikely to find other counsel. Similarly here, restrictions on Internet access at public libraries will harm those already disadvantaged by the digital divide, who are unlikely to find other ways to access the job information, educational opportunities, and myriad other benefits of the increasingly essential online world.

Finally, the wholly discretionary, largely irrational, and secretive nature of Internet filtering, combined with its known instances of viewpoint discrimination, underscore the need for strict scrutiny. This Court has consistently adhered to the principle that even in the provision of subsidies, government may not "'ai[m] at the suppression of dangerous ideas.'" *Regan v. Taxation With Representation*, 461 U.S.

expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment").

540, 548 (1983) (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)); see also *Perry v. Sindermann*,408 U.S. 593, 597 (1972) (government may not deny a benefit on a basis that infringes constitutionally protected interests, particularly the interest in freedom of speech). Thus, filtering companies' censorship of gay and lesbian sites, sexual health information, and critiques of filtering provide additional reasons for applying strict scrutiny.

B. *Because It Forces Libraries to Delegate Decisions to Private Filtering Companies Whose Products' Operation is Inherently Irrational, CIPA Fails Any Level of First Amendment Scrutiny, Including Rational Basis Review*

Even applying rational basis scrutiny, CIPA is unconstitutional. Its requirement that libraries turn over professional decisions to private companies that do not even reveal their operational processes or blacklists bears no rational relation to the legitimate statutory goal of preventing access to illegal content. The largely arbitrary nature of filters, with their tens of thousands of erroneously blocked sites, likewise bears no rational relation to the statutory goal.

Finally, CIPA's adverse impact on major demographic groups, including lower-income citizens, the elderly, the disabled, those with limited English skills, and other Americans, is so counterproductive, and contrary to any legitimate policy goal, as to render the statute irrational. CIPA cripples libraries' ability to provide all of these Americans with a critical means of communication and information resource in today's world. [33]

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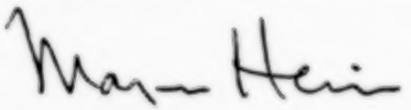
[33] Under any standard of review, Internet acceptable use policies are a less restrictive alternative to filters in accomplishing the

CONCLUSION

Congress's concerns about illegal online content are legitimate, but mandating Internet filters as a condition of federal subsidies cannot be a constitutionally acceptable solution. For these reasons, the decision below should be affirmed.

Respectfully submitted,



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government's goals. They are also more consistent with the American system of justice, which punishes violations of law after they occur, instead of imposing restraints on speech in advance.

APPENDIX: DESCRIPTION OF *AMICI*

Partnership for Progress on the Digital Divide (PPDD) is a not-for-profit organization that is engaging a broad diversity of individuals and organizations to spearhead a multi-associational, multi-disciplinary partnership between scholars, practitioners, and policymakers to make significant contributions in closing the digital divide. PPDD is an affiliate of the National Communication Association, the largest organization of communication teachers and scholars in the world. PPDD is reaching out beyond the communication discipline and academia to various other disciplines and groups in the U.S. and abroad who share interests, methods, and goals and want to work together to build on that common ground to find solutions to this pressing societal concern. PPDD believes that mandating Internet filters in public libraries impinges upon the rights of American citizens to unfettered access to information and, thus, violates the First Amendment and exacerbates the digital divide.

The Gay Lesbian Straight Education Network (GLSEN) is the largest national network of parents, students, educators and others working to create safe schools for lesbian, gay, bisexual and transgender students and staff. GLSEN believes that Web sites with pornographic content are not appropriate for minors. However, GLSEN maintains that Internet filtering programs are not the right approach. Because of the limitations in filtering programs or because of anti-lesbian, gay, bisexual and transgender (LGBT) bias on the part of the software manufacturers, sites with LGBT-related content could be blocked just for mentioning the words "gay" or "lesbian." Thus, valuable information for LGBT youth or about the LGBT community would be barred from those who may need, want, or benefit from such information.

Harlem Live is an Internet publication written, created, presented, and represented by teens in Harlem and throughout New York City. It broadens youth's view of the world using technology and journalism while fostering understanding through diversity. Its core purpose is to empower youth of color to be productive, creative and thoughtful leaders who will be responsible caretakers of our future.

Pacific News Service is a 30-year-old media and communications organization committed to engaging the most marginalized sectors of society in the civic forum. Its Youth Communications Team encompasses seven separate youth media projects including the 12 year-old *YO! Youth Outlook Magazine* (www.youthoutlook.org); *The Beat Within,* a writing program for incarcerated youth operating in six Bay Area county juvenile halls; Silicon Valley De-Bug (www.siliconvalleydebug.org), a community organizing, education and media program in San Jose, California; Poetry Television (www.poetrytelevision.com); *Afghan Journal*; The Civic Arts Partnership; and Roaddawgz (www.roaddawgz.org) – a media arts program for homeless youth. As an established media network and important vehicle for young people to learn personal and professional communications skills, Pacific News Service believes in the importance of unobstructed access to content on the Internet without the intervention of blocking software.

Peacefire (www.peacefire.org) was created to defend the interests of young people in the debate over Internet censorship, and to promote the use of the Internet to reduce discrimination against youth. Peacefire believes that blocking software obstructs progress by targeting controversial subjects, and by conditioning people to accept rules that are created without sufficient justification.

Rock Out Censorship (ROC) was created to defend the First Amendment rights of American citizens, primarily, but not exclusively focusing on music and popular culture censorship issues. The Rock Out Censorship Web site is among those that has been reported as blocked by filtering technology. Students and citizens turning to ROC for information on censorship are thus sadly and ironically prevented from finding that information due to Internet filters.

TRUCE (The Renaissance University for Community Education) is an arts education and media literacy youth development program in Harlem that is committed to equipping young people with the necessary tools to become leaders in their community. TRUCE is concerned about Internet filtering and the digital divide because in order to be an effective and educated leader one needs access to information. Filtering software compromises the ability to access relevant and important information, and thus it is problematic and harmful.

WireTap is a progressive news Webzine for socially conscious youth. It believes that Internet filtering prevents young people from reaching important information online regarding health, politics, and culture. WireTap advocates instead that people be taught media literacy skills, and thus acquire the ability to filter through the media themselves with a critical eye.

No. 02-361

IN THE

Supreme Court of the United States

UNITED STATES, *et al.*,

Appellants,

v.

AMERICAN LIBRARY ASSOCIATION, INC., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF *AMICI CURIAE* ASSOCIATION OF AMERICAN PUBLISHERS, INC., AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, AMERICAN SOCIETY OF NEWSPAPER EDITORS, AUTHORS GUILD, INC., CENTER FOR DEMOCRACY AND TECHNOLOGY, COMIC BOOK LEGAL DEFENSE FUND, MAGAZINE PUBLISHERS OF AMERICA, NATIONAL WRITER'S UNION, PUBLISHERS MARKETING ASSOCIATION, PEN AMERICAN CENTER, AND SOCIETY OF PROFESSIONAL JOURNALISTS IN SUPPORT OF APPELLEES

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INTRODUCTION AND INTEREST OF THE *AMICI*[1]

Amici Association of American Publishers, Inc., American Booksellers Foundation for Free Expression, American Society of Journalists and Authors, American Society of Newspaper Editors, Authors Guild, Inc., Center for Democracy and Technology, Comic Book Legal Defense Fund, Magazine Publishers of America, National Writer's Union, Publishers Marketing Association, PEN American Center, and Society of Professional Journalists are organizations whose members – including writers, editors, book and magazine publishers, and booksellers – have a profound interest in the vigorous exercise of their own First Amendment rights as well as those of the reading public.[2] *Amici*'s members are responsible for providing the reading public with ideas and information in every literary genre, both in traditional print media and, increasingly, over the Internet. As such, *amici* are concerned with safeguarding the ability of library patrons to access online the full range of the constitutionally protected materials that they write, publish, market, distribute, and sell.

As representatives of entities and individuals that both depend upon and sustain the rights guaranteed by the First Amendment, *amici* have long fought to safeguard those rights as they pertain to creators, distributors, and recipients of expressive works against abridgement by government, including attempts to censor content on the Internet. The Children's Internet Protection Act (CIPA) represents the government's latest attempt to muzzle the uniquely powerful communicative medium that is the Internet. *Amici* submit this brief in support

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1. Pursuant to Rule 37.6 of the rules of the Court, counsel for the *amici* discloses that counsel for the parties did not take part in authoring this brief in whole or in part, and no persons or entities other than the *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37(3)(a), *amici* have obtained, and are herewith lodging, the written consents of the parties to the filing of this brief.

2. *Amici* are more fully described in the Appendix.

of Appellees' effort to invalidate Congress' constitutionally insensitive attempt, through CIPA, to condition the receipt of federal funds by public libraries on the implementation of censorship in the form of Internet filtering. In doing so, *amici* seek to vindicate "the central concern of the First Amendment . . . that there be a free flow from creator to audience of whatever message [an expressive work] might convey." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 77 (1976) (Powell, J., concurring).

The vast majority of public libraries in this country have embraced the Internet as a cost-effective means of dramatically expanding the amount of information available to their patrons. In providing Internet access, public libraries have created designated public fora for expressive activity. Consistent with the First Amendment, content-based regulation of that expressive activity can only be carried out in a manner that can survive strict scrutiny, which CIPA's mandated filtering cannot. The district court's exhaustive factual findings convincingly document the conclusion that mandated filtering of Internet-enabled computers in public libraries is an ill-conceived means of preventing library patrons from accessing child pornography, obscenity, and, in the case of minors, material that is "harmful to minors." The unavoidable suppression by filtering software of valuable, constitutionally protected expression, such as that created by many of *amici*'s members, covering a vast range of essential subjects, from sexuality to politics, demonstrates that CIPA is not a narrowly tailored means of advancing Congress' goal of ensuring that library computers are not used to access unprotected sexual material.

While *amici* are sensitive to the desirability of shielding both minor and adult library patrons from unlawful images, Congress cannot seek to achieve that goal using means that subvert the very purpose of offering Internet access to library patrons by suppressing protected expression.

Appellants' characterization of CIPA as merely giving libraries a means to exercise "broad discretion to make content-based judgments in selecting material for their collections," in the same manner as they decide whether to acquire particular books, is misguided. App. Br. at 12. In reality, CIPA *deprives* local libraries of the discretion to determine appropriate guidelines for Internet usage. CIPA takes such decisions away from libraries and delegates them to software filtering companies whose proprietary criteria for blocking material are completely hidden from public scrutiny. This is in no way analogous to a decision by librarians to acquire a book on Mark Twain rather than one on rap music, for example. It is, instead, analogous to the scissoring by a government contractor of important articles from a magazine to which the library subscribes and to which library patrons expect full access.

The autonomy interests of local communities are ill-served by the choice with which CIPA, as a practical matter, presents many of them: offering no Internet access, on the one hand, or offering it only as radically abridged by third-party censors, on the other. The Constitution does not permit Congress to impose this unpalatable choice. The less restrictive alternatives catalogued by the district court, several of them recommended by two government studies, permit local communities and their public libraries to establish policies governing Internet usage by children and adults while making available the vast resources of the Internet for those who may rely on libraries as their only means of Internet access.

Because of these infirmities, *amici* urge the Court to affirm the district court's ruling that CIPA is an unconstitutional exercise of Congress' spending power.

SUMMARY OF ARGUMENT

As this Court has recognized, the Internet has become a modern-day publishing house, with immense amounts of material available twenty-four hours a day, and more content being added by the second. From the largest newspapers to the most unknown individuals, the Internet has become a preeminent means of distributing information throughout the world. The

vast majority of public libraries in the country have embraced the Internet, which dramatically enhances their ability to make ideas and information available to their patrons. The Children's Internet Protection Act, which conditions certain federal funding on the mandatory use of Internet filters by public libraries, would severely diminish the capacity of library patrons to access constitutionally protected materials via the Internet.

The district court correctly concluded that a public library's provision of Internet access constitutes a designated public forum and that CIPA's content-based restrictions on that forum are subject to strict scrutiny. Appellants' attempt to avoid public forum analysis by analogizing Internet filtering to a library's collection development practices is flawed. By arguing that a library has broad discretion in determining which books and magazines to include in its collection and should have the same discretion to filter the Internet, Appellants mischaracterize the effect of CIPA, which in fact *deprives* libraries of discretion to establish Internet use guidelines. Moreover, several key differences between a library's traditional collection development practices and its provision of Internet access, such as the lack of editorial judgment involved in providing Internet access in a library, undermine Appellants' strained analogy.

Appellants also err in claiming that even if a library's provision of Internet access is a designated public forum, only reasonableness review should apply. Libraries have decided to provide unfiltered Internet access to their patrons for expressive activity, and CIPA regulates expressive activity that is consistent with that forum. As such, Appellants carry the burden of demonstrating that CIPA is narrowly tailored to serve a compelling government interest using the least restrictive means. This is a burden Appellants cannot meet. As the district court correctly determined, in attempting to restrict obscenity, child pornography, and material harmful to minors – the targets of CIPA – Internet filters block substantial amounts of constitutionally protected material, ranging from World Wide Web sites devoted to the Bible to sites addressing health-related

issues. Additionally, numerous less restrictive alternatives, including Internet usage policies and more flexible filtering schemes, are available. Appellants have failed to demonstrate that these alternatives would be less effective than mandated Internet filters on all library computers. Accordingly, CIPA must be struck down because it would cause libraries to violate the First Amendment rights of library patrons.

ARGUMENT

In 2000, Congress enacted the Children's Internet Protection Act (CIPA), Pub. L. No. 106-554, Div. B, Tit. XVII, 114 Stat. 2763A-335, which requires that in order to receive grants under the Library Services and Technology Act, 20 U.S.C. §§ 9101, *et seq.* (LSTA), and "E-rate" discounts under the Telecommunications Act of 1996, 47 U.S.C. § 254, public libraries must certify that on every Internet-enabled computer (whether or not purchased with government funds), they are using a "technology protection measure" that prevents patrons from accessing "visual depictions" that are "obscene," "child pornography," or in the case of minors, "harmful to minors." 20 U.S.C. § 9134(f)(1)(A) (LSTA); 47 U.S.C. §§ 254(h)(6)(B) & (C) (E-rate). *See also American Library Ass'n, Inc. v. United States*, 201 F. Supp. 2d 401, 406-07 (E.D. Pa. 2002). In other words, CIPA mandates Internet filtering by public libraries as a condition of receiving sorely needed federal funding for computers, equipment, and Internet access.

The three-judge district court panel unanimously invalidated CIPA as an unconstitutional exercise of Congress' power under the Spending Clause on the ground that it requires libraries to violate the First Amendment rights of their patrons as a condition of receiving federal funds. *American Library Ass'n*, 201 F. Supp. 2d 401. *See also South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987) (Congress' spending power is subject to restrictions, including a bar on funding conditions that induce the recipient to violate constitutional provisions). In so holding, the court below rejected the government's claim that CIPA's filtering requirement should be subject only to rational basis or

reasonableness review. Instead, applying strict scrutiny, the court held that CIPA is not narrowly tailored, in part because all currently available filtering software necessarily blocks a substantial amount of material that is not obscene, child pornography, or harmful to minors. The court also found that the existence of less restrictive alternatives to filtering rendered CIPA unconstitutional. As explained below, the district court was correct in all respects.

I. THE INTERNET FURTHERS THE PURPOSE OF LIBRARIES IN FOSTERING FREEWHEELING INQUIRY

CIPA must be evaluated in light of the mission of libraries and the relationship of Internet access to that mission. Public libraries in America for centuries have played a special role in the circulation of ideas, the education of the citizenry, and the promotion of enlightened discourse. The roots of this tradition trace to Benjamin Franklin, who in 1731 founded the first subscription library in the American colonies. In his autobiography, Franklin extolled the achievements of the nation's libraries: "These libraries have improved the general conversation of the Americans, made the most common tradesmen and farmers as intelligent as most gentlemen from other countries, and perhaps have contributed in some degree to the stand so generally made throughout the colonies in defense of their privileges." BENJAMIN FRANKLIN, THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN (1793) (cited in Bernard W. Bell, *Filth, Filtering, and the First Amendment: Ruminations on Public Libraries' Use of Internet Filtering Software*, 53 FED. COMM. L.J. 191, 220 (2001)).

No less so than in the eighteenth century, public libraries today embody and further the free expression and freedom of thought and inquiry that are protected by the First Amendment. As federal courts have noted, a public library is a place of "freewheeling inquiry," *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 915 (1982) (Rehnquist, J., dissenting), a "mighty resource in the free marketplace of

ideas," *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 582 (6th Cir. 1976), and the "quintessential locus of the receipt of information," *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1255 (3d Cir. 1992). The district court in this case observed that public libraries "generally share a common mission – to provide patrons with a wide range of information and ideas." *American Library Ass'n*, 201 F. Supp. 2d at 420.

This mission has benefited enormously from the virtually limitless resources that the Internet has made available at the touch of a button to library patrons throughout the country. More than ninety percent of the nation's public libraries now provide public access to the Internet, and many of these libraries allow patrons to explore this virtual encyclopedia with few restrictions. *American Library Ass'n*, 201 F. Supp. 2d at 422.

As this Court has recognized, the Internet's remarkable success in expanding the "marketplace of ideas" has produced unprecedented benefits for content providers, immeasurably enriching and amplifying their communicative powers: "From the publishers' point of view, it constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 853 (1997) ("*ACLU*"). Today, for example, most major newspapers and magazines, from *The New York Times* to *Newsweek*, offer online editions of their publications, typically as quickly as – if not more quickly than – the hard copies hit the streets. In similar fashion, traditional book and magazine publishers sell and offer samples of their content online. These include Random House, which has a section of its site devoted to "e-books" (http://www.randomhouse.com/ebooks), and HarperCollins, whose site provides extensive descriptions and excerpts of its books (http://www.harpercollins.com). Barnes & Noble now sells both traditional print ebooks and e-books over the Internet. (http://www.barnesandnoble.com), while *Slate* magazine (http://

slate.msn.com), a journal of commentary on politics and culture, is one of the Internet's premier publications.

Many authors have taken advantage of the Internet to reach new audiences with greater immediacy. In an ongoing experimental endeavor, Stephen King recently turned to the Internet to publish a serial novel on his Web site (http://www.stephenking.com). *See* M.J. Rose, *Stephen King, the E-Publisher,* WIRED NEWS, June 11, 2000, *at* http://www.wired.com/news/culture/0,1284,36915,00.html. Political commentators have similarly embraced the "weblog" phenomenon and supplemented their publications in print magazines with daily analysis of current events on the World Wide Web. *See, e.g.*, Andrew Sullivan, *The Daily Dish*, *at* http://www.andrewsullivan.com; Mickey Kaus, *Kausfiles*, *at* http://www.kausfiles.com. "Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer." *ACLU*, 521 U.S. at 870. Several of the respondents in this case exemplify the range of valuable, and sometimes controversial, information available on the Internet to readers throughout the world. *See American Library Ass'n*, 201 F. Supp. 2d at 415-16.

As most public library libraries throughout the country have recognized, the vast and diverse materials accessible on the Internet, which change daily, add depth and breadth to the potential experience of library patrons, many of whom have no means of Internet access other than their local library. *See American Library Ass'n*, 201 F. Supp. 2d at 422. In the words of Appellee ALA, "The Internet is a rich and educational resource for information, ideas and entertainment. No other medium has provided us with so much information so easily." American Library Association, *Libraries & the Internet Toolkit*, *available at* http://www.ala.org/alaorg/oif/internettoolkit.html ("ALA *Internet Toolkit*"). For readers, the Internet is one of the best means of exposure to a diversity of

views and expressions, as well as goods and services. "The Web is . . . comparable, from the readers' viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services." *ACLU*, 521 U.S. at 853.

Of course, some of the material available on the Internet is pornography that is illegal for minors, adults, or both, although, as this Court has recognized, "users seldom encounter such content accidentally." *ACLU*, 521 U.S. at 854. CIPA represents an attempt by Congress to curb the use of the Internet by library patrons to access such material. But, as explained below, because CIPA seeks to restrict speech in a public forum in a way that interferes with the flow of valuable, constitutionally protected information over the Internet, and thus impedes the mission of libraries, it fails strict scrutiny and must be struck down.

II. FORUM ANALYSIS APPLIES TO THE PROVISION OF INTERNET ACCESS IN PUBLIC LIBRARIES

A. Internet Access in Public Libraries Is a Designated Public Forum

When the government regulates expressive activity on public property, those regulations are subject to constitutional scrutiny under the standards established by this Court's public forum doctrine. The Court has recognized three categories of public fora: the traditional public forum, the designated, or limited, public forum, and the nonpublic forum. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). In a traditional public forum, such as streets and parks, any content-based restrictions on speech must be narrowly tailored to advance a compelling government interest, and there must be no less restrictive alternative. *Id.* at 45; *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). Similarly, when the government creates a designated public forum, which consists of "public property which the state has opened for use by the public as a place for expressive activity," the government "is bound by the same standards as apply in a traditional public

forum." *Perry*, 460 U.S. at 45-46. *See also Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (government creates a public forum "by intentionally opening a nontraditional forum for public discourse"). In a nonpublic forum, government regulations must be merely reasonable and viewpoint-neutral. *Id.* at 46.

In determining whether the government has created a designated public forum, the Court looks to "the policy and practice of the government," as well as to "the nature of the property and its compatibility with expressive activity to discern the government's intent." *Id. See, e.g., Kreimer*, 958 F.2d at 1259-62 (holding that public library was limited public forum based on government's intent in opening library to expressive activity, broad extent of use granted, and nature of forum and its compatibility with expressive activity).[3]

As the district court correctly determined, a public library creates a designated public forum when it provides Internet access. First, Internet access in a library is obviously compatible with "expressive activity"; indeed, it is perhaps the most powerful medium for expressive activity ever invented. Further, as noted, providing Internet access helps libraries advance one of their central purposes: the dissemination of ideas. As Appellee ALA's "Freedom to Read Statement" advises:

3. In identifying the relevant forum, the Court looks to the access sought by the speaker. "In cases in which limited access is sought, our cases have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property." *Cornelius*, 473 U.S. at 801 (for purposes of exclusions from a federal employee charity drive, proper forum is not entire federal workplace, but charity drive to which respondents sought access). Because the access sought that is at issue here is to the Internet, not to libraries as a whole, the district court held that the "relevant forum for analysis is not the library's entire collection, which includes both print and electronic media, such as the Internet, but rather the specific forum created when the library provides its patrons with Internet access." *American Library Ass'n*, 201 F. Supp. 2d at 456. The unique characteristics of the Internet fully support this aspect of the court's decision.

"It is in the public interest for publishers and librarians to make available the widest diversity of views and expressions, including those that are unorthodox or unpopular with the majority." American Library Association, *Freedom to Read Statement*, *available at* http://www.ala.org/alaorg/oif/freeread.html. The longstanding deliberate "policy and practice" of libraries across the country of making the Internet available to library patrons greatly enhances the ability of libraries to further that interest. It is clear, therefore, that Internet access in public libraries is a designated public forum for exploration of "the widest diversity of views and expressions." *Id.*

The only other court to address the constitutionality of Internet filtering in public libraries, the Eastern District of Virginia in *Mainstream Loudoun v. Board of Trs. of Loudoun County Library*, 24 F. Supp. 2d 552 (E.D. Va. 1998), determined that Loudoun County intended to designate the county's libraries as public fora "for the limited purposes of the expressive activities they provide, including the receipt and communication of information through the Internet." *Id.* at 563. The court also concluded that the county had broadly opened the libraries to the public at large and that the nature of the libraries was compatible with the receipt and communication of information through the Internet. *Id.* The court thus held that a library is a limited public forum for purposes of its analysis of the constitutionality of mandated Internet filtering in county libraries. *Id.*

As is evident from the *Loudoun* decision, designated public forum analysis is appropriate in this case whether the forum is deemed to be Internet access (as the district court held) or the library as a whole (as the *Loudoun* court held).[4] This conclusion

4. The *Loudoun* court struck down a county policy that required all county libraries to install Internet filtering software to block material that was obscene, child pornography or harmful to minors, on the ground that it was an unconstitutional prior restraint. *Amici* believe CIPA is unconstitutional on that ground as well, for the reasons stated in *Loudoun*. Since the district court did not reach that issue, *amici* do not address it further herein.

is reinforced by the numerous other decisions in which public libraries have been held to be designated public fora.[5]

B. Appellants' Claim That Internet Filtering Is No More Subject to Judicial Scrutiny Than Library Collection Development Is Flawed

Appellants attempt to avoid forum analysis altogether by characterizing Internet filtering as a library collection development practice. They argue that libraries have broad discretion in determining which books, magazines, and other materials to include in their collections, and that the same deference must be accorded to a library's decision to install Internet filtering software. App. Br. at 17-32. Thus, Appellants assert that

> a public library's need to exercise judgment in making collection decisions depends . . . on the traditional role that public libraries play in our society in identifying material that is suitable and worthwhile for their patrons. A library is no less entitled to play that role when it collects material from the Internet than when it collects material from any other source.

Id. at 28. This assertion is misguided in several respects.

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5. *See, e.g., Kreimer*, 958 F.2d at 1259 ("[T]he Library constitutes a limited public forum, a type of designated public fora."). *See also Hawkins v. City & County of Denver*, 170 F.3d 1281, 1287 (10th Cir. 1999) ("Examples of designated public fora include . . . public libraries."); *Neinast v. Board of Trs. of Columbus Metro. Library*, 190 F. Supp. 2d 1040, 1043 (S.D. Ohio 2002) ("[A] public library clearly is a limited public forum."); *Armstrong v. District of Columbia Pub. Library*, 154 F. Supp. 2d 67, 75 (D.D.C. 2001) ("The parties correctly assert that a public library is a limited public forum for purposes of constitutional analysis."); *Sund v. City of Wichita Falls, Tex.*, 121 F. Supp. 2d 530, 548 (N.D. Tex. 2000) ("The Wichita Falls Public Library, like all other public libraries, is a limited public forum for purposes of First Amendment analysis.").

First, the characterization of mandated filtering as an exercise of the library's traditional discretion with respect to the composition of its collection ignores the fact that CIPA actually *deprives* libraries of discretion in establishing appropriate Internet usage guidelines. CIPA leaves the library no discretion except as to the specific filtering software utilized and the circumstances in which to permit unblocking upon request. Because many libraries rely on federal assistance in order to afford computers and Internet connectivity, *see American Library Ass'n*, 201 F. Supp. 2d at 414-15, they have no realistic alternative but to comply with CIPA by using Internet filtering software if they are to offer Internet access. Hence, it is wholly inapposite for Appellants to equate Congress' mandate that library Internet access be filtered – the inevitable consequence of which, as the district court found, is to deprive library patrons of substantial amounts of constitutionally protected expression – with the exercise of the library's discretion regarding the composition of its collection. Libraries do not "collect material from the Internet," App. Br. at 28; rather, they make the Internet as a whole available and allow library patrons to do the "collecting."

In reality, installing filtering software involves outsourcing acquisition decisions to third parties whose methodology for discriminating between permissible and impermissible content is proprietary and thus not subject to review by librarians or the public. *American Library Ass'n*, 201 F. Supp. 2d at 430. Mandatory Internet filtering is properly understood as tantamount to a library subscribing to the *New Republic* magazine but only receiving it after an outside vendor has torn out all articles that refer to Dick Armey or Dick Cheney because they contain the keyword "dick" – without disclosing why such articles were censored. *See* Marjorie Heins & Christina Cho, *Internet Filters: A Public Policy Report*, National Coalition Against Censorship (Fall 2001), *available at* http://www.ncac.org/issues/internetfilters.html (documenting a similar finding).

There are also other significant differences between a library's traditional collection development practices and the required use of Internet filters. By providing Internet access, a library permits patrons to receive vast amounts of speech "without attempting to restrict patrons' access to speech that the library, in the exercise of its professional judgment, determines to be particularly valuable." *American Library Ass'n*, 201 F. Supp. 2d at 462. By contrast, in selecting materials to include in its collection, librarians regularly use their editorial discretion, review the materials, and make judgments as to what to acquire, based on a variety of criteria. *Id.* at 463. As the district court put it, "[t]he essence of editorial discretion requires the exercise of professional judgment in examining the content that the government singles out as speech of particular value." *Id.* Internet filtering involves no such judgment by librarians.

In addition, when a library decides to include a book or magazine in its collection, the library becomes the owner of that material; it becomes a (more or less) permanent part of the library's collection. When a library provides access to the Internet, by contrast, the library does not lay claim to the Internet, much of which, in any event, is transitory in nature. Hence, content on the Internet does not carry the library's imprimatur even to the limited extent the printed books, magazines, and newspapers in the library's collection do.

Finally, libraries often provide Internet access for purposes that are not comparable to putting books on the shelf. Some libraries, for instance, allow patrons to use the Internet to check e-mail, participate in chat rooms, and play online games. *Id.* at 422. These distinct characteristics and capabilities of the Internet expose the flaws in Appellants' effort to depict Internet access as nothing more than an extension of the library's collection. That mischaracterization elides distinctions that are critical to the proper resolution of this case.

III. CIPA MUST, BUT CANNOT, SURVIVE STRICT SCRUTINY

A. Reasonableness Review Does Not Apply, as Internet Filters Regulate Speech That Is Consistent With the Purposes of the Forum

Appellants argue that even if a library's provision of Internet access is deemed a designated public forum, reasonableness review, rather than strict scrutiny, should apply to mandatory filtering. App. Br. at 38-39. It is true that in creating a public forum, the government may confine the forum "'to the limited and legitimate purposes for which it was created,'" *id.* (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)), and that any limitations in defining the forum must be "'reasonable in light of the purpose served by the forum.'" *Id.* at 39 (quoting *Rosenberger*, 515 U.S. at 829 (internal quotations omitted)). But Appellants are wrong to claim that because the purpose of library-provided Internet access is to facilitate research, learning, and recreation, and because the material required to be filtered by CIPA is inconsistent with that purpose, only a reasonableness standard of review should apply. *Id.* at 38.

Appellants' argument rests upon the fallacious premise that the government has created the forum, namely Internet access sanitized of obscenity, child pornography, and material harmful to minors. In fact, the actual forum – unfiltered Internet access in public libraries – long predates CIPA. By 1996, nearly five years before the passage of CIPA, almost half of the nation's public libraries provided Internet access. John Carlo Bertot *et al.*, *1996 National Survey of Public Libraries and the Internet: Progress and Issues*, National Commission on Libraries and Information Sciences, *available at* http://slis-two.lis.fsu.edu/~cmcclure/nspl96/NSPL96_T.html (figure 5 shows that in 1996, 44.6 percent of public libraries provided Internet access). As of June 2000, six months before CIPA was signed into law, 95.7 percent of public libraries provided Internet access. Of those, less than 10 percent used filtering software on all their

computers, and only an additional 15 percent used filtering software on some of their computers. John Carlo Bertot *et al.*, *Public Libraries and the Internet 2000: Summary Findings and Data Tables*, National Commission on Libraries and Information Sciences, at 11, 18, *available at* http://www.nclis.gov/statsurv/2000plo.pdf.

It is clear, then, that by the time Congress enacted CIPA, the great majority of public libraries had already determined to provide their patrons with unfiltered Internet access as a forum for expressive activity. Only after those fora had been created did Congress seek to regulate them through CIPA. Thus, CIPA does not define the parameters of a forum, as the school district did in *Perry* with respect to its internal mail system or the federal government did in *Cornelius* with respect to the charity drive. Rather, CIPA imposes content-based restrictions on expressive activity within a preexisting forum that properly are subject to strict scrutiny. *See Playboy*, 529 U.S. at 811-13.

B. CIPA Is Not Narrowly Tailored to Serve the Government's Interest in Preventing the Dissemination of Obscenity, Child Pornography, and Material Harmful to Minors

Strict scrutiny requires a statute that regulates speech based on its content to be narrowly tailored to promote a compelling government interest using the least restrictive means. *Playboy*, 529 U.S. at 813; *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends."). As the district court exhaustively documented, CIPA fails strict scrutiny because it is not narrowly tailored to serve the government interest in preventing the dissemination of obscenity, child pornography, and, in the case of minors, material that is harmful to minors. *American Library Ass'n*, 201 F. Supp. 2d at 475-79.

To the contrary, the extremely poor fit between, on the one hand, filtering software, which is neither capable of evaluating

images nor calibrated to the legal definitions of obscenity, child pornography, and material harmful to minors, and, on the other, the government's objective of ensuring that obscenity, child pornography, and material harmful to minors are not available over the Internet in public libraries, renders CIPA fatally overbroad. Lack of precision in regulating speech is not justified by valid governmental goals. *See, e.g.*, *ACLU*, 521 U.S. at 875 ("It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults." (citations omitted)); *Sable*, 492 U.S. at 128 ("The federal parties nevertheless argue that the total ban on indecent commercial telephone communications is justified because nothing less could prevent children from gaining access to such messages. We find the argument quite unpersuasive.").

The substantial overblocking catalogued by the district court is of particular concern to *amici*. As the district court found, Internet filters suffer from multiple inherent inadequacies that result in the blocking of vast amounts of constitutionally protected material. These deficiencies include: (1) automated review of blocked sites that fails to distinguish accurately between appropriate and inappropriate content; (2) human review of blocked sites that is hampered by limited resources and human error, including the desire to "err of the side of caution" by overblocking and lack of training in the legal definitions of obscenity, child pornography, and harmful to minors; (3) blocking of entire Web sites even when only a small minority of their pages contain objectionable material; (4) blocking by IP address that erroneously filters out thousands of Web pages; (5) blocking sites that archive pages that have been removed from the Web by their original publisher; and (6) the failures of filtering companies to engage in regular re-review of Web pages, which change on an ongoing basis. *American Library Ass'n*, 201 F. Supp. 2d at 433, 448-49. Moreover, as noted, the district court also found that the category

definitions of filtering software do not correspond to the legal definitions employed in CIPA and that the word-based search modes employed by software filters are not able to evaluate images. Thus, "[n]o presently conceivable technology can make the judgments necessary to determine whether a visual depiction fits the legal definitions of obscenity, child pornography, or harmful to minors." *Id.* at 449.

The government's own expert concluded that between six and fifteen percent of the blocked Web sites to which library patrons sought access contained no content that met even the filtering software's definitions of sexually explicit content. *American Library Ass'n*, 201 F. Supp. 2d at 475-76. The court noted numerous examples of erroneously blocked sites that contained valuable content that was not even sexual in nature. These blocked sites ranged from the site of the Knights of Columbus Council 4828 (http://msnhomepages.talkcity.com/SpiritSt/kofc4828), blocked by Cyber Patrol, to a Columbia University health question-and-answer site (http://www.goaskalice.com.columbia.edu), blocked by Smartfilter. *American Library Ass'n*, 201 F. Supp. 2d at 446-47. As the district court noted,

> At least tens of thousands of pages of the indexable Web are overblocked by each of the filtering programs evaluated by experts in this case. . . . Many erroneously blocked pages contain content that is completely innocuous for both adults and minors, and that no rational person could conclude matches the filtering companies' category definition, such as "pornography" or sex."

Id. at 449.

In addition to the record amassed below, numerous studies have similarly shown that the lack of precision inherent in filtering software results in the blocking of valuable, lawful material, often based on the presence of a keyword that, in

another context, might be associated with sexual content. Among sites that have been blocked in studies of filtering software are:

- The Jefferson Bible (http://www.angelfire.com/co/JeffersonBible), a Web site containing Biblical passages selected by Thomas Jefferson, blocked by N2H2's BESS filtering software;
- a Web page from *Mother Jones* magazine's site (http://bsd.mojones.com/hellraiser_central), blocked by BESS;
- The Smoking Gun (http://www.smokinggun.com), a popular Web site providing primary legal and other documents relating to current events, blocked by BESS;
- the Web page of "American Government and Politics," a course at St. John's University (http://users.aol.com/drblw/homepage.htm), blocked by BESS;
- the home page for Donna Rice Hughes's book, *Kids Online: Protecting Your Children in Cyberspace* (http://www.protectkids.com), blocked by Cyber Sentinel;
- the home pages for the Center for Democracy and Technology (http://www.cdt.org), the ACLU (http://www.aclu.org), and Electronic Frontier Foundation (http://www.eff.org), and the American Family Association (http://www.afa.net), all blocked by ClickSafe;
- numerous Web sites related to homosexuality, including A Different Light Bookstore (http://www.adlbooks.com), blocked by CYBERsitter;
- ZapHealth (http://www.zaphealth.com), a health-education Web site, blocked by Cyber Patrol; and

- the online version of *Explore Underwater* magazine (http://www.exploreuw.com), blocked by Cyber Patrol.

See generally Heins & Cho, *Internet Filters: A Public Policy Report*. Many classic works of literature, or passages from them, also have been blocked, including *The Grapes of Wrath* because of a passage in which a woman lets a starving man suckle at her breast, *The Jungle Book*, *Moby Dick*, and the following passage from Robert Frost's "Stopping by the Woods on a Snowy Evening" because of use of the word "queer": "My little horse must think it queer/To stop without a farmhouse near." *Id.*

The imprecision of the filtering software required by CIPA, which leads to the blocking of sites that have nothing to do with sex, as well as of those that discuss sex and sexuality in a non-prurient, informational manner, renders it even worse in terms of its impact on protected speech than the imprecision of the terms "indecent" and "patently offensive" in the Communications Decency Act, which this Court struck down as vague and overbroad. *See ACLU*, 521 U.S. at 878 (CDA's restrictions "may also extend to discussions about prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalog of the Carnegie Library"). *Amici* strongly believe that the Constitution does not permit the government to require library patrons to pay such a high price in terms of the suppression of protected Internet content as a condition of their libraries qualifying for federal funding.

The consequence of CIPA is to distort the medium of the Internet as available in public libraries by interfering with its normal, lawful use. In other contexts, the Court has found interference with expression in a manner that distorts the functioning of a communicative forum to be impermissible. *See, e.g., Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 544 (2001) (restriction on federal funding program prohibiting use of funds to challenge welfare laws held unconstitutional in part because it "distorts the legal system by altering the traditional role of the attorneys" receiving funding); *FCC v. League of*

Women Voters of Cal., 468 U.S. 364, 384 (1984) (striking down statute forbidding noncommercial educational broadcasting stations from engaging in editorializing as a condition of receiving certain federal funds and noting that through the statute Congress sought "to limit discussion of controversial topics and thus to shape the agenda for public debate").

Appellants' response to CIPA's severe overbreadth problem is to fall back on the flawed analogy to library collection development. Thus, it argues that a public library "does not have an obligation to add material to its collection simply because the material is constitutionally protected." App. Br. at 40. But this claim ignores the marked differences, discussed above, between a library's provision of Internet access and its collection development practices. The critical point is that public libraries have decided to make the totality of the Internet available to their patrons (subject to certain restrictions in some libraries) but, under CIPA, they are told that they can no longer do so if they want government money.

Appellants' assertion that the overblocking problem is not constitutionally significant because library patrons need only ask a librarian to unblock the site or, in the case of adults, disable the filter, App. Br. at 42-44, is wrong. This Court has recognized the right to receive constitutionally protected information without having to disclose personal information in order to do so. *See, e.g., Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 754 (1996) (striking down provisions of federal law regulating sexually explicit programming on cable television in part because requirement that subscriber make written request to view such material could have a chilling effect); *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965) (requirement that individuals must specifically request to receive "communist political propaganda" through the mail "is almost certain to have a deterrent effect, especially as respects those who have sensitive positions"). The district court was presented with, and credited, testimony attesting to the existence of a chilling effect. *See American Library Ass'n,*

201 F. Supp. 2d at 411 ("[R]equiring library patrons to ask for a Web site to be unblocked will deter many patrons because they are embarrassed, or desire to protect their privacy or remain anonymous.").

Nor does the fact that blocked content "is certainly available in numerous other places, including other computers with Internet access," Brief of American Center for Law and Justice *et al.* at 16, cure CIPA's constitutional deficiencies. The availability of other venues for censored speech does not justify a content-based abridgement of such speech. *See, e.g.*, *ACLU*, 521 U.S. at 879 (rejecting government's contention that CDA's prohibitions on modalities such as chat rooms, newsgroups, and mail exploders are constitutional because speakers could still engage in restricted speech on World Wide Web); *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.").[6] Moreover, approximately one-fifth of Internet users with a household income of less than $15,000 rely upon public libraries for Internet access. *American Library Ass'n*, 201 F. Supp. 2d at 422.

Because CIPA effectively requires libraries to block substantial amounts of constitutionally protected content on the Internet, Appellants' claim that CIPA is narrowly tailored fails.[7]

6. *See also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975) ("Whether Petitioner might have used some other, privately owned, theater in the city for the production is of no consequence."). The claim made by some of Petitioner's *amici* that CIPA is a content-neutral "time, place, and manner method of restricting access" to unprotected material, Brief of National Law Center for Children and Families *et al.* at 19, is without merit. As the district court recognized, "[s]oftware filters, by definition, block access to speech on the basis of its content, and content-based restrictions on speech are generally subject to strict scrutiny." *American Library Ass'n*, 201 F. Supp. 2d at 454.

7. *Amici* note that this case has no bearing on the right of copyright owners to deny access to works that are protected by digital rights management technology.

C. Appellants Have Not Shown That Less Restrictive Alternatives Would Not Advance the Government's Interest

Appellants also fail to rebut the district court's finding that there are a number of less restrictive alternatives that would be as effective, if not more effective, than CIPA in protecting library patrons from inappropriate online content without blocking access to protected material. Contrary to Appellants' claim (*see* App. Br. at 44), "[w]hen a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Playboy*, 529 U.S. at 816. "[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it." *Id.* at 815.

The district court recognized several such less restrictive means that many libraries have already adopted, including Internet use policies posted in prominent locations; requiring patrons to sign forms agreeing to comply with the policies; and presenting patrons with a screen displaying the policies when they sign on to a computer. *American Library Ass'n*, 201 F. Supp. 2d at 480. In addition, just as libraries regularly track patrons' book check-outs, they can review Internet activity. As the district court noted, any violations of such policies can result in a number of sanctions that a library might opt to impose. *Id.* at 481. While such policies might not be perfect, they are certainly no less effective than Internet filters and are far more effective in allowing access to material that does not even arguably constitute obscenity, child pornography, or harmful-to-minors material. *Id.* at 480-81. Among the other measures recommended by Appellee ALA is teaching children how to use the Internet and to be critical users of information. *See* ALA *Internet Toolkit*.

The government's assertion that Internet filters are the most effective and least restrictive means of achieving its goals is at odds with an October 2000 report issued by the Commission on Child Online Protection. Commission on Child Online

Protection, *Report to Congress* (Oct. 20, 2000), *available at* http://www.copacommission.org/report. In that report, a congressionally-created commission studied methods to help reduce access by minors to sexually explicit material on the Internet. Among the methods examined were Internet filters, about which the report stated: "This technology raises First Amendment concerns because of its potential to be over-inclusive in blocking content. Concerns are increased because the extent of blocking is often unclear and not disclosed, and may not be based on parental choices." *Id.* at 19-22. Equally noteworthy, the commission did not recommend the mandatory use of Internet filters as a means of protecting minors, and advised that protective measures be "voluntary." *Id.* at 39. The commission expressed support for several other less restrictive alternatives, including the adoption of Internet use policies and the implementation of public education campaigns on protecting children from inappropriate Internet material. *Id.* at 39-46. *See also* National Academy of Sciences, *Youth, Pornography, and the Internet* (May 2002) (expressing concerns over Internet filters and support for alternative strategies).

In other contexts, this Court has heard arguments that the voluntary use of filtering can be part of a less restrictive alternative to government-imposed censorship. In litigations concerning the Communications Decency Act and the Child Online Protection Act, many of the *amici* advanced the view that among the less restrictive alternatives to censorship of Internet speech are governmental actions to promote and facilitate the voluntary use of filtering software by parents. *See, e.g.*, *ACLU*, 521 U.S. at 877 (noting the significance of "user-based" alternatives to governmental action). These "least restrictive alternative" arguments further highlight why CIPA is unconstitutional.

Less restrictive alternatives to CIPA that involve filtering include libraries offering some computers with filters and others without filters, *see American Library Ass'n*, 201 F. Supp. 2d at 484, and giving parents the option to decide whether young

minors can access the Internet unfiltered. *Id.* at 482. These possibilities are consistent with the "user empowerment" approach of placing technology and decision-making in the hands of parents and users, and not the government, to control access to Internet content.

The Court recently considered whether voluntary, parent-controlled alternatives could represent a less restrictive alternative to government-mandated blocking of content. In *Playboy*, the Court held that governmental attempts to promote voluntary efforts by parents to protect their children from sexual content are a less restrictive alternative to blocking mandated by statute. 529 U.S. at 827. Specifically, the Court ruled that a statute that required cable companies to scramble sexually explicit programming was unconstitutional in light of the less restrictive alternative of governmental promotion of voluntary blocking of the signal upon parental request. *Id.* at 822. As the Court observed, "targeted blocking [initiated by parents] enables the government to support parental authority without affecting the First Amendment interests of speakers and willing listeners." *Id.* at 815. The Court made clear that

> it is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restricuive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.

Id. at 824. As noted, it is the government's burden to show that such a plausible less restrictive alternative would not be effective. *Id.* at 816. It has not done so here.

The critical difference between the use of blocks and filters in *ACLU* and *Playboy*, on the one hand, and the use of filters in the CIPA statute, on the other, is this: CIPA mandates that filters be imposed on Internet access as a condition of receiving federal funding. It is by mandating that filters be imposed on all computers in public libraries that the government crosses the line into unconstitutional censorship.

The unnecessary restrictiveness of CIPA is highlighted by its requirement that filters be imposed on *all* computers in a library that accepts federal funding under the E-rate or LSTA programs, even those in the private offices of research librarians. *American Library Ass'n*, 201 F. Supp. 2d at 413 ("[T]he FCC has concluded that 'CIPA makes no distinction between computers used only by staff and those accessible to the public.'" (citation omitted)). Thus, even in contexts where there is no question that a library professional can make his or her own judgment about what content is necessary and appropriate, CIPA still mandates the imposition of filters.

The voluntary use of filtering technology is certainly among the many available tools that parents and users can employ to address concerns about Internet content. When those tools are mandated by statute, however, the government uses technology not to empower users but to censor them. As the Court stated in *Playboy*, 529 U.S. at 818:

> The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority. Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that CIPA is an unconstitutional exercise of Congress's spending power and that the entry of a permanent injunction should be affirmed.

Respectfully submitted,

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APPENDIX — THE *AMICI*

The Association of American Publishers, Inc. (AAP) is the national association in the United States of publishers of general books, textbooks and educational materials. The AAP's approximately 300 members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish most of the general, educational and religious books and materials produced in the United States. AAP's members are actively involved in the Internet; they create electronic products to accompany and supplement their printed books and journals; create custom educational materials on the Internet; and have Web pages and provide information to the world on the Internet.

The American Booksellers Foundation for Free Expression (ABFFE) was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

The American Society of Journalists and Authors (ASJA) is the national organization of independent nonfiction writers, with more than 1,000 members across the country. The mission of the ASJA is to promote the welfare and professional rights of writers and to defend against censorship and other actions that would abridge free communication. As book authors and magazine writers, the ASJA's members have a strong interest in defending against any action that would limit the public's freedom to read.

Appendix A

The American Society of Newspaper Editors is a professional organization of more than 800 persons who hold positions as directing editors of daily newspapers in the United States and Canada. The purposes of the Society include assisting journalists and providing an unfettered and effective press in the service of the American people.

The Authors Guild, Inc. (the "Guild"), founded in 1912, is a national non-profit association of more than 7,700 professional, published writers of all genres and 140 authors who have active publishing contracts and are awaiting publication of their first books. Guild members have won Nobel and Pulitzer Prizes, National Book Awards, Guggenheim and MacArthur Fellowships, Motion Picture Academy Awards, Tony and Emmy Awards and countless other awards and prizes. The Authors Guild works to promote the professional interests of authors in various areas, including freedom of expression, threats to which bear directly on the ability of authors to carry on their business of writing as a livelihood.

The Center for Democracy and Technology (CDT) is a non-profit public interest and Internet policy organization. CDT represents the public's interest in an open, decentralized Internet reflecting constitutional and democratic values of free expression, privacy, and individual liberty. CDT's staff have conducted extensive policy research, published academic papers analyses, and testified before Congress on the impact of Internet content regulations and the availability of alternative methods for protecting individuals online, including user-empowerment tools and technologies.

Appendix A

The Comic Book Legal Defense Fund (CBLDF) is an organization dedicated to defending the First Amendment rights of the American comic book industry. CBLDF represents artists, publishers, and distributors, as well as the broader community of specialty retailers and readers. Largely because comics are a graphic-based art form, the comic industry was quick to embrace the Internet, not only as a means to advertise and distribute its product, but as a new environment in which to create comics. Today, the largest individual retailers of comic books in the United States are Internet-based, and online commerce in comics is steadily increasing.

Magazine Publishers of America (MPA) is a national trade association including in its present membership more than 240 domestic magazine publishers who publish over 1,400 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering consumer affairs, law, literature, religion, political affairs, science, sports, agriculture, industry and many other interests, avocations and pastimes of the American people.

The National Writers Union (NWU) is the only labor union that represents freelance writers in all genres, formats, and media. The NWU has 6,500 members in 17 chapters nationwide. The NWU works to advance the economic and working conditions of writers. Its constitution specifically cites as a central principle that it is "committed to freedom of the press, freedom of speech and freedom of expression in all media. . . . The NWU is committed to full public access to information and to the means of distributing ideas or information."

Appendix A

PEN American Center, the professional association of over 2,600 literary writers (poets, playwrights, essayists, editors, and novelists), is the largest in a global network of 131 Centers around the world comprising International PEN. PEN's mission is to promote literature and protect free expression whenever writers or their work are threatened. In particular, PEN defends writers from censorship, harassment, and imprisonment. In the United States, PEN American Center defends the First Amendment whenever it comes under attack. To advocate for free speech in the United States, PEN mobilizes the literary community to apply its leverage through sign-on letter campaigns, direct appeals to policy makers, participation in lawsuits and *amicus curiae* briefs, briefing of elected officials, awards for First Amendment defenders, and public events.

The Publishers Marketing Association (PMA) is a nonprofit trade association representing more than 2,000 publishers across the United States and Canada. PMA represents predominantly nonfiction publishers and assists members in their marketing efforts to the trade.

The Society of Professional Journalists (SPJ) is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

No. 02-361

IN THE

Supreme Court of the United States

UNITED STATES, *et al.*,

Appellants,

v.

AMERICAN LIBRARY ASSOCIATION, INC., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF *AMICUS CURIAE* THE BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW IN SUPPORT OF APPELLEES

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INTEREST OF *AMICUS CURIAE*

The Brennan Center for Justice at New York University School of Law ("Brennan Center") submits this *amicus curiae* brief in support of the American Library Association, the Multnomah County Library Association and the other Appellees.[1]

The Brennan Center is a nonpartisan institute dedicated to implementing an agenda of scholarship, public education, and legal action that promotes equality and human dignity, while safeguarding fundamental freedoms. The Center was established in 1995 to honor the extraordinary legacy of Justice William J. Brennan, Jr.

The Brennan Center takes a particular interest in this case because it presents the Court with two important issues concerning the power of government to assert control over private speakers in subsidized speech settings. First, may the government censor constitutionally protected private speech in subsidized public libraries by ousting the professional editorial judgment of local librarians and replacing it with judgments dictated by elected federal officials? Second, may Congress displace librarians' judgments even when the constitutionally protected private speech is privately funded?

The Brennan Center has participated in a series of cases before this Court involving the relationship between

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1. Pursuant to Supreme Court Rule 37.3(a), consent by the parties for the filing of this *amicus curiae* brief has been granted and their consents are being lodged herewith. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than *amicus*, has contributed monetarily to the preparation or submission of this brief.

the First Amendment and government speech subsidies, including as lead counsel in *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001), and as both counsel for *amici* and one of the *amici* in *Board of Regents of Univ. of Wis. v. Southworth*, 529 U.S. 217 (2000), and in *NEA v. Finley*, 524 U.S. 569 (1998). The Brennan Center is currently participating as co-counsel in three district court cases in which the unconstitutional conditions doctrine plays a prominent role: *McConnell v. FEC*, Civ. No. 02-582 (CKK, KLH, RJL) (D.D.C. argued Dec. 4-5, 2002) (three-judge court); *Dobbins v. Legal Servs. Corp.*, 01 Civ. 8371 (FB) (E.D.N.Y. filed Dec. 14, 2001); and *Velazquez v. Legal Servs. Corp.*, 985 F. Supp. 323 (E.D.N.Y. 1997), *aff'd in part, rev'd in part*, 164 F.3d 757 (2d Cir. 1999), *aff'd*, 531 U.S. 533 (2001).

In this case, the district court declined to decide the unconstitutional conditions issues, preferring to rule on forum grounds. *American Library Ass'n v. United States*, 201 F. Supp. 2d 401, 490 n.36 (E.D. Pa. 2002) (three-judge court). The Center believes that the district court's forum analysis is correct and that this Court need not reach the unconstitutional conditions issues. However, in the event that the Court determines to address these issues, the Center files this *amicus curiae* brief with the hope that its perspective on the unconstitutional conditions doctrine will assist the Court.

SUMMARY OF ARGUMENT

Under this Court's unconstitutional conditions jurisprudence, the law challenged in this appeal—the Children's Internet Protection Act—cannot survive because it conditions the receipt of government funding on the sacrifice of fundamentally important First Amendment rights. The law wreaks this constitutional havoc in the public library, a uniquely important institution in our democratic culture whose defining feature is its solemn promise to provide each citizen with equal and unfettered access to explore, within the constraints of budget and the professional judgment of librarians, the sweep of human thought and experience.

This Court's unconstitutional conditions precedents have consistently recognized that the substantial power of the government's purse is ultimately constrained by the First Amendment—the government cannot purchase the First Amendment rights of those who participate in government-funded programs, whether the setting is the public university, as in *Keyishian v. Board of Regents of Univ. of State of N.Y.*, the public airwaves, as in *FCC v. League of Women Voters*, or the courts, as in *Velazquez*. Where a challenged law distorts the traditional functioning of private expression in a forum that is essential to the functioning of a free society, this Court has made clear that the law must fall.

Just as in those landmark subsidy cases—where one law told professors what to teach, one law told the media what to say, and one law told lawyers what to argue—the law challenged here imposes state-sponsored censorship that tells library patrons what they can read, what they can think, and what they can view in their local public library. The censoring software mandated by the law bars research on a variety of subjects: certain churches and religious groups, certain political candidates

and municipal governments, certain health issues and scientific matters, information about educational and employment opportunities, and even facts about sports and travel. By interfering in this way with the work of researchers, scholars, librarians, and web site publishers, the law effectively scissors out—on command of the national government, and without regard to a librarian's professional judgment or a local community's need—key chapters in the dynamic and vast encyclopedia of the Internet. Under the unconstitutional conditions doctrine, this extreme distortion of the library function plainly violates the First Amendment.

An equally troubling aspect of the challenged law is its application to every single computer in a public library—even those computers the library pays for with its own private funds. At least since *Regan v. Taxation With Representation of Wash.* and *League of Women Voters*, this Court has made absolutely clear that the unconstitutional conditions doctrine does not allow the government to condition the receipt of a subsidy on the sacrifice of private expression that is privately financed—the government must always afford speakers an adequate channel for such expression. The government insists in this case that libraries possess such an adequate channel in that they remain free to operate unfiltered computers in physically separate library facilities. Even if the challenged law permitted this, and it does not, forcing researchers to travel to remote facilities and to forego other key library resources, when the government offers no constitutionally cognizable justification, would impose an undue burden on researchers, make it less likely that valuable web sites will ever be accessed, and interfere with the administration and independence of libraries themselves. This interference with privately funded First Amendment–protected expression constitutes an additional and independent violation of the unconstitutional conditions doctrine.

ARGUMENT

I. BY REQUIRING FEDERALLY SUBSIDIZED PUBLIC LIBRARIES TO CENSOR PRIVATE SPEECH ON INTERNET-CONNECTED COMPUTERS, THE GOVERNMENT DISTORTS THE TRADITIONAL FUNCTION OF PUBLIC LIBRARIES IN VIOLATION OF THE UNCONSTITUTIONAL CONDITIONS DOCTRINE.

A. The Unconstitutional Conditions Doctrine Bars the Government from Using Its Subsidy Programs to Suppress Private Speech in Ways that Distort the Underlying Forum.

Throughout its unconstitutional conditions jurisprudence, this Court has held that the government may not use its subsidy programs to suppress private speech in a way that distorts the underlying forum for that speech, particularly where, as here, the integrity of the forum is essential to the functioning of a free society. *See, e.g.*, *Velazquez*, 531 U.S. 533; *Southworth*, 529 U.S. 217; *Finley*, 524 U.S. 569; *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Rust v. Sullivan*, 500 U.S. 173 (1991); *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

In *League of Women Voters*, for example, the Court invalidated a federal law that had prohibited privately owned public broadcasting stations from engaging in editorializing if they received a grant of funds from the Corporation for Public Broadcasting. The Court held that since the purpose of public broadcasting is to offer a "wide variety" of views

on important social issues, the law's suppression of the opinions of one set of speakers—the station owners and managers—violated the First Amendment because "its effect is plainly to diminish rather than augment the volume and quality" of speech inherent in the medium of public broadcasting. 468 U.S. at 396, 399 (internal quotation marks and citation omitted).

In *Forbes*, another case involving public broadcasting, the Court upheld a restriction on government-subsidized private speech where the restriction advanced the proper functioning of the underlying forum for speech. The case involved the ability of a state-owned public television station, as a protected speaker, to exercise its First Amendment-based editorial judgment to exclude from a televised debate a Congressional candidate with insufficient political support. The Court reasoned that while a debate broadcast on public television is a form of government speech subsidy, the station's reasonable exclusion of certain speakers promoted effective public education by preventing a "cacophony" of candidate voices from garbling the intelligibility of the debate, an outcome that would have discouraged stations from airing future debates. 523 U.S. at 681.

In the context of public universities, the Court in *Rosenberger* overturned a University of Virginia policy that had prohibited student activity fees from being used to subsidize student publications that expressed religious editorial viewpoints. The Court's opinion made clear that this policy was unconstitutional because it undermined both the function of the university's student activity fee, which is to "encourage a diversity of views from private speakers," and the traditional function of the university itself, which is

to promote "free speech and creative inquiry." 515 U.S. at 834, 836. More recently, in *Southworth*, the Court upheld a public university's policy conditioning admission on a student's contributing to a fund that subsidized an array of campus groups, even though some students objected to being forced to fund certain groups' speech with which they disagreed. The Court sustained the policy because it advanced the university's mission of stimulating an intellectual marketplace of ideas both in and out of the classroom. 529 U.S. at 233.[2]

In *Velazquez*, the Court drew together this line of precedents to hold that when the government designs a subsidy program to facilitate the communication of private, nongovernmental speech—as it did in these cases—the First Amendment forbids the government from imposing restrictions to "suppress speech inherent in the nature of the medium," particularly where the medium—like public universities, public broadcasting and the courts—is integral to the functioning of a free society. 531 U.S. at 543, 546 (invalidating restriction on subsidized speech in part because it "threatens severe impairment of the judicial function").[3]

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2. In the context of government arts grants, the Court in *Finley* upheld a federal statute requiring the NEA to consider general standards of decency and respect in awarding grants to artists. The Court's decision rested in part on the fact that these non-binding standards did not interfere with the NEA's fundamental ability to pursue its mission of "encouraging freedom of thought, imagination, and inquiry," by subsidizing even private artistic expression "deemed indecent or disrespectful." 524 U.S. at 573, 580 (internal quotation marks and citations omitted).

3. *See also Rust*, 500 U.S. at 200 (upholding restriction applicable to government-subsidized physicians, but contrasting the university as "a traditional sphere of free expression so fundamental

(Cont'd)

Velazquez addressed the constitutionality of a law that had prohibited federally subsidized legal aid lawyers from challenging welfare reform laws in the course of representing individual clients seeking welfare benefits. The Court declared the law unconstitutional because it prevented lawyers engaged in advancing private speech from "advising their clients and . . . presenting arguments and analyses to the courts," thereby "distort[ing] the legal system by altering the traditional role of the attorneys." *Id.* at 544. The Court added that by "seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power." *Id.* at 545. The Court distinguished its decision in *Rust* upholding a speech restriction applied to government-subsidized family planning physicians, on the ground that the physicians were advancing governmental speech as contrasted with private speech. The legal aid subsidy program, on the other hand, was subsidized by government "to facilitate [the] private speech" of the lawyers' clients, "not to promote a governmental message." *Id.* at 542.

In *Velazquez*, and in each of the cases discussed above, the government had enacted a restriction on private speech in order to regulate the use of public funds. The *Velazquez* decision, taken together with the "unconstitutional conditions" cases discussed herein, establishes the principle that the First Amendment bars the government from imposing restrictions on private speech in subsidized speech settings

(Cont'd)
to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the . . . First Amendment.")

when the restrictions distort the proper functioning of the underlying forum, especially when the integrity of that forum is essential to a free society. *Id.* at 543.

B. Subsidized Speech in Public Libraries Deserves the Same Vigorous First Amendment Protection Afforded Subsidized Speech In Public Universities, Public Broadcasting Systems and the Courts.

Public libraries are analogous to public universities, public broadcasting systems, and the courts as vital institutions in a free society. For this reason, this Court should hold that Congress' power to control subsidized private speech in local public libraries is no greater than in these three settings.

Consider the example of public universities. In the university setting, the Court has consistently rejected government restrictions on speech that interfere with a public university's traditional role of educating students "through wide exposure to [a] robust exchange of ideas . . . rather than through any kind of authoritative selection." *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (internal quotation marks and citation omitted). *See also Rosenberger*, 515 U.S. at 835-36 (discussing heightened need to protect free speech in universities, which are "the center of our intellectual and philosophic tradition"). In so holding, this Court has declared academic freedom in this subsidized setting to be of "special concern" to the First Amendment:

> To impose any strait jacket upon the intellectual leaders in our colleges and universities would

> imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Keyishian, 385 U.S. at 603 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).

This theory applies equally, if not more forcefully, to protect freedom of speech in public libraries. Like universities, America's public libraries have traditionally functioned as islands of free intellectual inquiry dedicated to the acquisition of knowledge by an autonomous citizenry. As the "principal locus" of our freedom to study, explore and test the full range of human thought and experience, libraries perform a unique institutional role; they allow us to engage in purely voluntary "self-education and individual enrichment," limited not by government restraints but merely by the boundaries of our own curiosity and imagination. *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 868, 869 (1982). *See also id.* at 915 (Rehnquist, J., dissenting) (noting that "public libraries" are "designed for freewheeling inquiry"). As the past president of the New York Public Library, Vartan Gregorian, recently observed:

> Libraries contain the heritage of humanity, the record of its triumphs and failures, its intellectual,

> scientific and artistic achievements and its collective memory. They are a source of knowledge, scholarship and wisdom. They are an institution, withal, where the left and the right, God and the Devil, are together classified and retained, in order to teach us what to emulate and what not to repeat. Libraries are, thus, the most tolerant institutions we have, the good and the evil are here, and the library makes no value judgments about them.

Vartan Gregorian, *Libraries as Acts of Civic Renewal*, Address at the Kansas City Club (Oct. 17, 2002), *at* http://www.kclibrary.org/gregorianspeech (last visited Feb. 9, 2003).

Libraries play an institutional role similar to that of universities by providing a forum for the unfettered intellectual inquiry and exploration that is essential to the functioning of a free and self-governing society. Indeed, this Court has recognized that, unlike the classroom, where faculty necessarily exercise some degree of control over the content of discussion and debate, libraries offer unique opportunities both to "discover areas of interest and thought not covered by [any] prescribed curriculum," and to "test or expand upon ideas presented . . . in or out of the classroom." *Pico*, 457 U.S. at 869 (internal quotation marks and citation omitted). In this respect, the heightened constitutional protection afforded speech within the privileged sphere of the university should apply with even greater force to bar the government from censoring subsidized private speech in public libraries. As in *Keyishian*, merely because the government subsidizes professors in public universities, or librarians in public libraries, it may not exercise a degree of control over their First Amendment activities.

C. By Requiring Public Libraries to Censor Private Speech, the Government Distorts the Traditional Function of Public Libraries in Violation of the Unconstitutional Conditions Doctrine.

The government, through the Children's Internet Protection Act ("CIPA"),[4] censors private speech by requiring public libraries that receive either of two forms of federal benefits—federal grants pursuant to the Library Services and Technology Act[5] ("LSTA"), or discounts for Internet access pursuant to the Telecommunications Act of 1996[6] ("E-rate program")—to certify that they are using on all Internet-connected computers a "technology protection measure that prevents patrons from accessing visual depictions that are obscene, child pornography, or in the case of minors, harmful to minors." *American Library Ass'n*, 201 F. Supp. 2d at 407 (quoting 20 U.S.C. § 9134(f)(1)(A) (LSTA) and 47 U.S.C. § 254(h)(6)(B) & (C) (E-rate program)) (internal quotation marks omitted).

The law's explicit intent is to ban three very limited and narrow categories of visual expression from the Internet in public libraries—obscenity, child pornography and visual depictions harmful to minors—each of which falls beyond the scope of First Amendment protection. *See, e.g., New York v. Ferber*, 458 U.S. 747 (1982) (holding child pornography not entitled to First Amendment protection). However, as the three-judge district court found, CIPA's ultimate effect is to require public libraries, by installing and operating filtering software, to necessarily block "a very substantial amount"

4. Pub. L. No. 106-554, Div. B, Tit. XVII, 114 Stat. 2763A-335 (2000).

5. 20 U.S.C. § 9101, *et seq.*

6. 47 U.S.C. § 254(h).

of constitutionally protected speech based solely on its content. *American Library Ass'n*, 201 F. Supp. 2d at 448, 490. *See also id.* at 454 ("Software filters, by definition, block access to speech on the basis of its content."). This direct censorship of valuable speech is caused by the inherent technological limitations of filtering software programs, which, as the district court found, "erroneously block a huge amount of speech that is protected by the First Amendment." *Id.* at 448. The district court explained further:

> Any currently available filtering product that is reasonably effective in preventing users from accessing content within the filter's category definitions will necessarily block countless thousands of Web pages, the content of which does not match the filtering company's category definitions, much less the legal definitions of obscenity, child pornography, or harmful to minors. Even [the government's] expert witness . . . found that between 6% and 15% of the blocked Web sites in the public libraries that he analyzed did not contain content that meets even the filtering products' own definitions of sexually explicit content, let alone CIPA's [narrower] definitions.

Id. See also id. at 427-37 (describing how filtering software necessarily blocks more information than it is intended to block).

Following are just some of the numerous types of constitutionally protected speech that the district court found

blocked by the leading filtering software programs available to public libraries:

- *Speech by and about churches and religious groups*, including web sites for a Knights of Columbus chapter affiliated with St. Patrick's church in Fallon, Nevada; a Christian orphanage in Honduras; and a lesbian and gay Jewish Center in California;

- *Speech about politics and government*, including web sites for individual candidates for state and local office in Massachusetts and California; the government of Adams County, Pennsylvania; Wisconsin Right to Life; and an anti-death penalty group in Denmark;

- *Speech about health issues*, including web sites about allergies and halitosis, for the Willis-Knighton Cancer Center in Louisiana, and about health information provided by Columbia University;

- *Speech about education and careers*, including web sites about home schooling, about careers for social workers, about careers in dentistry, and for a gay and lesbian chamber of commerce in Nevada;

- *Speech about sports*, including web sites about the first African American professional hockey player, an Australian football club, and a fan's site for the Toronto Maple Leafs hockey team; and

- *Speech about travel*, including web sites for a bed and breakfast in North Carolina, a nature tour operator in Namibia, a fly fishing outfitter in Canada, and a travel service for gay men.

Id. at 446-47.

This censorship interferes with the ability of government-subsidized public libraries to communicate a set of constitutionally protected private messages to their patrons in the same way that the law in *Velazquez* interfered with the ability of government-subsidized lawyers to communicate a client's private message to the courts. In both instances, the censorship suppresses speech vital to the proper functioning of the relevant forum. *See Velazquez*, 531 U.S. at 545 (concluding restriction on lawyers' speech prohibits "expression upon which courts must depend for the proper exercise of the judicial power").[7] This interference alters the usual functioning of public libraries, in violation of the unconstitutional conditions doctrine, by requiring libraries to do exactly what they are not supposed to do: censor

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7. The Supreme Court has recognized that the Internet, itself, creates "a vast democratic for[um]" for the communication of private speech by "millions of readers, viewers, researchers, and buyers." *See Reno v. ACLU*, 521 U.S. 844, 853, 868 (1997). By subsidizing participation in this forum through the LSTA and E-rate programs, the government facilitates the communication of private speech and not any particular governmental message. *See* Section I.D. below. The speakers in this case therefore include not only the public libraries, but also the censored web site publishers, librarians, library patrons, and donors to the libraries. The effect of filtering software in censoring thousands of Internet publications has been characterized by one court as the equivalent of blackening out significant portions of a set of encyclopedias. *See Mainstream Loudon v. Board of Trs. of Loudon County Library*, 2 F. Supp. 2d 783, 793 (E.D. Va. 1998) (*Loudon I*).

valuable information that they would make available but for a government directive.

As the government concedes in this case, America's diverse public libraries share a common mission of providing patrons with a wide array of information and ideas. Brief for the United States (hereinafter "U.S. Br.") at 20 ("Consistent with their missions, public libraries seek to provide a wide array of information to the public."). *See also American Library Ass'n*, 201 F. Supp. 2d at 420. This mission requires public libraries to provide local communities with access to "materials and information presenting all points of view on current and historical issues." *American Library Ass'n*, 201 F. Supp. 2d at 420 (quoting American Library Ass'n, Library Bill of Rights (1980)). Although resource limitations obviously thwart public libraries from providing universal coverage within the space of their physical collections, public libraries nevertheless attempt to assist "patrons in obtaining access to *all* materials except those that are illegal," by utilizing interlibrary loan systems, referrals to other libraries and, today, with the help of the federal government, the Internet. *Id.* at 421 (emphasis added).

Insofar as local librarians, as a practical matter, must make content-based decisions about which books to acquire for their libraries' physical collections, these decisions are guided by professional standards that strive for balance in a library's collection, while counseling acquisition of materials of "requisite and appropriate quality. . . . that would be of the greatest direct benefit or interest to the community." *Id.* These standards bar librarians from making collection decisions based on "'partisan or doctrinal disapproval'" of materials. *Id.* at 420 (quoting American Library Ass'n, Library Bill of Rights). *See also Pico*, 457 U.S. at 870 (barring elected officials from removing school library books

based on "narrowly partisan or political" objections). These standards state that librarians must provide access to "'the widest diversity of views and expressions, including those that are unorthodox or unpopular with the majority,'" and that they must "'contest encroachments upon th[e] freedom [to read] by individuals or groups seeking to impose their own standards or tastes upon the community at large.'" *American Library Ass'n*, 201 F. Supp. 2d at 420 (quoting American Library Ass'n, Freedom to Read Statement (2000)). *See also Mainstream Loudon v. Board of Trs. of Loudon County Library*, 24 F. Supp. 2d 552, 563 (E.D. Va. 1998) (*Loudon II*) (quoting local government resolution stating purpose of county's public library system is to offer "the widest possible diversity of views and expressions" and not to censor ideas).

Here, the government effectively forces public libraries to abandon this mission by requiring them to deny patrons access to a substantial amount of valuable information on the Internet that the libraries have decided should be made available. It is no answer to say that since librarians are able to exercise proper editorial judgments about which books to acquire for their libraries' collections, the federal government can dictate those judgments. *See* U.S. Br. at 50. This is clear from *Velazquez*, where this Court struck down a regulation precluding civil legal aid lawyers from making certain arguments in court. The fact that legal aid lawyers exercise their professional judgment, in ways similar to librarians, in determining what arguments to advance in court on behalf of their clients, did not authorize the federal government to dictate those judgments merely because the government subsidized the lawyers' speech. *See* 531 U.S. at 544.

To the contrary, by usurping the professional editorial judgment of local librarians about the material that should be kept in public libraries, and replacing it with judgments dictated by elected federal officials, CIPA distorts the basic functioning of public libraries. *See* U.S. Br. at 20 (conceding that to "fulfill their traditional missions, public libraries must have broad discretion to decide what material to provide their patrons.").[8] A librarian's exercise of her editorial discretion is a form of protected speech activity. *Cf. Forbes*, 523 U.S. at 674 ("When a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity."). By supplanting that discretion with the government's decision to remove materials from a library's collection—a decision that is imposed without regard to whether censored web sites contain valuable information that is protected by the Constitution and of direct benefit or interest to the community—the government violates the First Amendment. *Cf. Finley*, 524 U.S. at 580-81, 586 (upholding decency and respect criteria for government arts grants because criteria are "merely hortatory" and do not supplant the aesthetic judgments made by expert panelists in awarding grants).

The government suggests that by subsidizing Internet access Congress was merely furthering public libraries' "traditional role of obtaining requisite and appropriate material for educational and informational purposes,"

8. The district court observed that, among the various ways that public libraries have voluntarily chosen to respond to the availability of sexually explicit content on the Internet, approximately 93% have *rejected* using filtering software. *American Library Ass'n*, 201 F. Supp. 2d at 406. Forcing libraries to install filtering software would consequently have a dramatic effect on the usual operation of public libraries in America.

U.S. Br. at 50, however, this argument is unavailing for at least two reasons. First, the government's brief cites no support in the statute or the legislative record for this proposition. Second, CIPA's speech regulation, rather than merely limiting the type of material that may be *obtained* with federal funds, is more accurately described as an attempt by Congress to override the professional judgments of local librarians by forcing them to *remove* material that they have already decided to obtain.

D. *Rust* Does Not Apply in This Case, Because Only Private Speech Is at Stake.

The government's reliance on *Rust* for the proposition that CIPA is an appropriate law because it merely defines the limit and scope of a government subsidy program, U.S. Br. at 50, is misplaced. *See Velazquez*, 531 U.S. at 547 (rejecting government attempt to "recast a condition on funding as a mere definition of its program" because the condition implicates "central First Amendment concerns."). In *Rust*, the Court upheld federal regulations barring government-subsidized doctors from discussing abortion when providing family planning advice, explaining that the federal program, by definition, was designed to "lead to conception and childbirth." 500 U.S. at 193. In post-*Rust* cases, this Court has clarified that *Rust* does not apply in situations where, as here, the government subsidizes private speech, as contrasted with government speech intended to advance a particular governmental message. In *Velazquez*, for example, the Court explicitly distinguished *Rust* as relying on the "rationale that the counseling activities of the doctors under Title X amounted to governmental speech." 531 U.S. at 541. *See also Southworth*, 529 U.S. at 229 (explaining that unlike *Rust*, *Southworth* "does not raise the issue of the

government's right . . . to use its own funds to advance a particular message"); *Rosenberger*, 515 U.S. at 834 (distinguishing *Rust* as inapplicable in cases where the government "does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers").

In this case, the government does not, and could not, dispute that by designing the LSTA and E-rate programs to provide "Internet access to . . . libraries in low-income communities," *American Library Ass'n*, 201 F. Supp. 2d at 407, Congress has created a subsidy program not to communicate any particular governmental message, but to facilitate public libraries providing patrons with access to the "vast amount" of private speech available on the Internet. U.S. Br. at 3. *See also Reno v. ACLU*, 521 U.S. 844, 868 (1997) (stating that the Internet is a vast forum for private speech). Thus, unlike the regulations upheld in *Rust*, CIPA restricts private, nongovernmental speech. *Rust* consequently does not control this case. *See Velazquez*, 531 U.S. at 542-43.[9]

For the aforementioned reasons, the government's requirement that federally subsidized public libraries install

9. The government also misreads *Velazquez* as distinguishing *Rust* solely on the ground that "the role of lawyers supported by federal funds who represent clients in welfare disputes is to advocate *against* the government, and there was thus an assumption that counsel would be free of state control." U.S. Br. at 51-52 (emphasis in original). Rather, the *Velazquez* Court repeatedly stated its holding more broadly as relying on the "salient point" that, "like the program in *Rosenberger*," which did *not* involve speech against the government, "the LSC program was designed to facilitate private speech, not to promote a governmental message." *Velazquez*, 531 U.S. at 542.

filtering software on all computers, censoring a substantial amount of private speech, distorts the traditional functioning of public libraries in violation of the unconstitutional conditions doctrine.[10]

II. BY PROHIBITING PUBLIC LIBRARIES FROM USING THEIR OWN NON-FEDERAL FUNDS TO PROVIDE FULL ACCESS TO THE INTERNET, THE GOVERNMENT VIOLATES THE UNCONSTITUTIONAL CONDITIONS DOCTRINE.

By requiring public libraries to filter Internet access even on computers financed entirely with their own non-federal funds, the law imposes an additional unconstitutional condition. In *League of Women Voters*, the Court invalidated a statute that had imposed a flat ban against editorializing by privately owned public broadcasting stations that received federal grants. The Court explained that the statute imposed an unconstitutional condition because it failed to provide any mechanism allowing the stations to use private funds for First Amendment activity. The Court observed that a station receiving "only 1% of its overall income from [federal] grants is barred absolutely from all editorializing. . . . The station has no way of limiting the use of its federal funds to all noneditorializing activities, and, more importantly, is barred from using even wholly private funds to finance its editorial activity." 468 U.S. at 400.

10. It is not necessary for the Court to determine the precise level of scrutiny to apply in this case, because under any constitutional balancing test, no government purpose can justify the law's ban on private speech in public libraries. *See Watchtower Bible & Tract Socy. of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 122 S. Ct. 2080, 2088 (2002) (declining to decide precise standard of review, because regulation was invalid under any level of First Amendment scrutiny).

Much as in *League of Women Voters*, the law challenged here also violates the First Amendment by requiring a public library that receives federal funds to operate filtering software "with respect to *any* of its computers with Internet access" during "*any use* of such computers." 20 U.S.C. § 9134(f)(1); 47 U.S.C. § 254(h)(6)(B) & (C) (emphases added). This requirement imposes a flat ban against a library's use of even private funds to operate unfiltered computers in an effort to provide patrons with access to the full range of constitutionally protected speech on the Internet. This flat ban against the use of private funds to pursue First Amendment activity, on penalty of the loss of federal funding, imposes an unconstitutional condition on public libraries. *See League of Women Voters*, 468 U.S. at 399-400.

The government's attempt to rescue the statute by interpreting it to permit libraries to use non-federal funds to operate unfiltered computers, so long as they do so in physically separate facilities or branches, U.S. Br. at 51, fails for at least two reasons. First, the government's interpretation contradicts CIPA's plain terms, which expressly require a subsidized library to operate filtering software on all of its Internet-connected computers, without regard to funding source. Congress authorized no exceptions, including for privately funded computers. While courts have a duty to avoid constitutional questions through statutory construction, they are not "free to redraft statutory schemes in ways not anticipated by Congress solely to avoid constitutional difficulties." *Lowe v. SEC*, 472 U.S. 181, 213 (1985) (White, J., concurring). *See also Miller v. French*, 530 U.S. 327, 341 (2000) ("[T]he canon of constitutional doubt permits us to avoid such questions only where the saving construction is not plainly contrary to the intent of Congress.") (internal quotation marks and citation omitted). The government's

attempt to redraft CIPA in clear violation of Congress' explicit intent must be rejected.

Second, while the government's unauthorized interpretation of the statute should be disregarded, the interpretation itself conflicts with the First Amendment by imposing an undue burden on the rights of libraries, patrons, librarians, library donors, and web site publishers without any government justification. *See United States v. Playboy Entm't Group*, 529 U.S. 803, 812 (2000) ("The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans."). There is no serious question that requiring financially strapped public libraries in low-income communities to build or rent additional facilities, and to pay for net increases in utility, maintenance, administrative and personnel costs, would impose a substantial burden. In addition, requiring librarians, scholars and researchers to shuttle back and forth between physically separate facilities according to the particular thought in their mind or the topic they are trying to research, introduces a substantial additional level of burden (presenting a scenario having more in common with a Monty Python skit than with traditional scholarly inquiry).

Moreover, the government has offered no justification for imposing such a burden on the ability of public libraries to use their own private and other non-federal funds to facilitate private speech. The government argues that, under *Rust*, Congress may "ensure the integrity" of its LSTA and E-rate programs by requiring that federally funded and non-federally funded Internet-connected computers be housed in physically separate facilities. U.S. Br. at 51 (quotation marks

and citation omitted). However, *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983), and *League of Women Voters*, both indicate that physical separation between federally and non-federally funded activities is not required to ensure the integrity of government subsidy programs. And *Rust*, which upheld as reasonable a physical separation requirement in the setting of a federal family planning program, does not control this case.

Thus, in *Taxation With Representation*, this Court stressed that Congress may not unduly interfere with the ability of subsidized private speakers to use non-federal funds to pursue First Amendment activities. The Court held that Congress' requirement that certain tax-exempt entities establish a legally separate affiliate in order to conduct lobbying activities was "not unduly burdensome," given the government's interest in not subsidizing lobbying activities. 461 U.S. at 544 n.6. However, in a concurring opinion, Justice Blackmun warned that this holding was premised on the understanding that the government did not require any additional separation measures. *Id.* at 553 (Blackmun, J., concurring) (warning that the imposition of additional controls beyond bookkeeping separation "would negate the saving effect of [the legally separate affiliate avenue]" and pose intolerable burdens on the "constitutional right [of organizations] to speak and to petition the Government").

Similarly, in *League of Women Voters*, this Court reiterated that the First Amendment guarantees recipients of federal subsidies the right to use private funds to engage in First Amendment-protected speech. In overturning a law that had absolutely barred public broadcasting stations that accepted federal subsidies from editorializing, the Court stated that the constitutional violation caused by the absolute

bar would be cured if Congress permitted stations to use non-federal funds "to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds," i.e., Congress could require legal, but not physical, separation. 468 U.S. at 400.

Rust is the only decision of this Court upholding a requirement that "physically separate" facilities be maintained in order to take advantage of the First Amendment right to use non-federal funds for protected activities. *Rust* holds that where separate physical facilities are shown to be necessary to preserve the fiscal integrity of a federal program and to prevent public confusion about who sponsors a particular program, a requirement of physical separation may be justified, despite the economic burden it imposes on the use of non-federal funds. 500 U.S. at 188-90.

However, as discussed in Section I.D. above, *Rust* does not apply here. *Rust* involved a subsidy program designed to communicate a particular governmental message, and the Court held that physical separation was justified by the government's need to avoid confusing the public about the content of the government's message. 500 U.S. at 188. But in programs such as CIPA, where government is not the "speaker," but rather is subsidizing private speakers, *Rust* does not apply. *See, e.g.*, *Velazquez*, 533 U.S. at 541; *Rosenberger*, 515 U.S. at 834. In the absence of a governmental message, this Court has never approved a requirement of physical separation like that suggested by the government in this case. Such a requirement would directly interfere with free expression in public libraries and is not justifiable. Under traditional First Amendment analysis, burdens on First Amendment freedoms will not be tolerated unless they: (1) advance an extremely important governmental interest, *see, e.g.*, *City of Ladue v. Gilleo*, 512 U.S. 43, 54 (1994)

(finding an asserted interest valid but not compelling); and (2) are no more extensive than necessary to advance the government's interest, *see Playboy*, 529 U.S. at 803. The government's physically separate facilities proposal fails both tests, because the government has no constitutionally cognizable justification for imposing such a burdensome requirement.

CONCLUSION

By requiring federally subsidized public libraries to censor private speech on Internet-connected computers, the government distorts the traditional function of public libraries in violation of the unconstitutional conditions doctrine. By prohibiting public libraries from using their own non-federal funds to provide full access to the Internet, the government also violates the unconstitutional conditions doctrine. The judgment of the district court should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *et al.*,
Appellants,

v.

AMERICAN LIBRARY ASSOCIATION, INC., *et al.*
Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

BRIEF OF *AMICI CURIAE* ONLINE POLICY GROUP, INC. AND SETH FINKELSTEIN IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST[1]

The Online Policy Group, Inc. ("OPG") is a nonprofit organization dedicated to online policy research, outreach, and action. OPG is concerned with the privacy, safety, and civil liberties of Internet participants, as well as the uneven distribution of Internet resources along social, ethnic, racial, and economic lines. OPG works to end this "digital divide" by providing free Internet services to nonprofit organizations and individuals who are underrepresented, underserved, or facing unfair bias, discrimination, or defamation. Both of the funding programs at issue in this case, "E-rate" discounts under the Telecommunications Act of 1996, *see* 47 U.S.C. § 254, and direct grants under the Library Services and Technology Act, *see* 20 U.S.C. §§ 9133-34, 9141, are essential to ending the digital divide because they help public libraries make the Internet available to people with no other means of access. OPG is therefore critically concerned with whether public libraries will be able to continue providing these services without infringing upon the civil liberties of Internet participants.

Seth Finkelstein is a computer programmer and civil liberties advocate. Since 1995, he has dedicated thousands of hours to studying commercially developed Internet blocking software. These efforts have revealed many of the mechanisms employed by blocking software, which Mr. Finkelstein has described in articles and reports.[2] For his

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[1] Counsel for all parties have consented to the filing of this brief, and *amici* have filed those consents with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than the undersigned *amici* and their counsel, has made a monetary contribution to this brief's preparation and submission.

[2] *See, e.g.*, Seth Finkelstein, *BESS's Secret LOOPHOLE*, *at* http://sethf.com/anticensorware/bess/loophole.php; Seth Finkelstein, *BESS vs. The Google Search Engine (Cache, Groups, Images)*, *at*

efforts "in the fight against government mandated use" of such software, Mr. Finkelstein received the Electronic Frontier Foundation's Pioneer Award. Mr. Finkelstein is interested in ensuring that the Court understands how commercially developed blocking software operates and the dangers that it poses to free speech.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the decision below, the panel held that libraries create a designated public forum when they provide Internet access to the public and that any content-based restrictions upon that access, such as CIPA's blocking provisions, are therefore subject to strict scrutiny. *See Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 454-70 (E.D. Pa. 2002) ("*ALA*"). Although *amici* agree with this analysis, they believe that there is a more straightforward reason why CIPA's blocking provisions are subject to strict scrutiny.

The Children's Internet Protection Act ("CIPA"), Pub. L. No. 106-554, Div. B., Title XVII, 114 Stat. 2763A-335 (2000), requires libraries participating in certain federal funding programs to block Internet access to visual depictions that are obscene, child pornography, or (in some circumstances) harmful to minors through a particular method: the use of a "technology protection measure." *Id.* § 1712 (codified at 20 U.S.C. § 9134(f)(1)); *id.* § 1721 (codified at 47 U.S.C. § 254(h)(6)). Although the Act defines the term "technology protection measure," *id.*

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http://sethf.com/anticensorware/bess/google.php; Seth Finkelstein & Lee Tien, *Blacklisting Bytes*, *at* http: //www.eff.org/Censorship/Censorware/20010306_eff_nrc_paper1.html; Seth Finkelstein, *The Pre-Slipped Slope—Censorware vs. the Wayback Machine Web Archive*, *at* http://sethf.com/anticensorware/general/slip.php; Seth Finkelstein, *Smartfilter's Greatest Evils*, *at* http://sethf.com/anticensorware/smartfilter/greatestevils.php.

§ 1703, it offers no guidance on how such measures should distinguish between the low-value speech banned by CIPA and other speech on the Internet that is entitled to full First Amendment protection. Instead, CIPA simply defines a "technology protection measure" as a "specific technology that blocks or filters Internet access." *Id.* This blind faith in technology is badly—and dangerously—misplaced.

Because libraries lack the technological capability to block the Internet in any narrowly tailored fashion, CIPA's "technology protection measure" requirement effectively forces them to use commercial blocking software. Commercial blocking software is, however, ill-suited to the requirements of the First Amendment. First, the current market does not offer products designed to filter out only the low-value speech barred by CIPA. As a consequence, the blocking software currently available on the market purposefully blocks far broader categories that include protected speech. Second, companies that produce blocking software have little incentive to tailor their products narrowly. To the contrary, because underblocking, not overblocking, generates complaints, these companies have strong economic incentives to design their software to block in an overbroad fashion. Third, commercial blocking software companies can, and in some instances do, use criteria that systematically discriminate against certain viewpoints. As a consequence, CIPA's "technology protection measure" requirement forces libraries to regulate speech in manner that is systematically overbroad and that can involve viewpoint discrimination. Whether or not libraries create a designated public forum when they provide access to the Internet, the use of such an inherently suspect method of regulating speech should be subject to strict scrutiny.

ARGUMENT

CIPA'S "TECHNOLOGY PROTECTION MEASURE" REQUIREMENT SHOULD BE SUBJECT TO STRICT SCRUTINY BECAUSE IT REGULATES SPEECH IN A SUSPECT MANNER

A. CIPA Forces Libraries to Regulate Speech Through Commercial Blocking Software

To comply with CIPA, libraries that wish to provide their patrons with broad access to the Internet are forced, as a practical matter, to rely upon commercial blocking software. The Internet is massive. In 1997, it consisted of approximately 9.4 million host computers used by over 40 million people. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 850 (1997). As of September 2001, the number of people using the Internet had expanded tenfold to at least 400 million, including approximately 143 million in the United States alone. *See ALA*, 201 F. Supp. 2d at 416. Moreover, by that time, the rapidly expanding Internet had over 11 million unique "web" sites with more than two billion web pages reachable through ordinary search engines. *See id.* at 418-19. Libraries do not have the technological capacity or expertise to write software that can filter through such a vast store of information and determine which sites contain visual depictions that are obscene, child pornography, or harmful to minors. As a consequence, libraries that are not content to provide their patrons with access to only a small number of pre-screened sites are generally forced to rely upon commercially developed blocking software, also sometimes known as "censorware," to comply with CIPA's "technology protection measure" requirement.

Although the Government correctly points out that commercial blocking software permits users to "unblock" specific sites, Gov't Br. at 4, libraries in fact have little ability to customize blocking software. Blocking software

typically prohibits Internet users from accessing any domain name or Internet Protocol address that is contained on "control lists" compiled by the software's vendor. *See ALA*, 201 F. Supp. 2d at 428. Software companies do not, however, reveal how these control lists are compiled. To the contrary, the companies treat the heuristics and other methods they use as well as the lists of sites that those methods generate as proprietary information, which they do not reveal to libraries and other consumers. *See id.* at 430; *see also* 17 U.S.C. § 1201(a)(1)(A) (making it illegal to circumvent measures protecting software). Moreover, while users can unblock particular sites, *see ALA*, 201 F. Supp. 2d at 429, it is impossible for a user to personalize blocking software in any significant manner because the control lists compiled by blocking companies typically contain hundreds of thousands of sites, and the Internet is ever-expanding. *See Youth, Pornography, and the Internet* 286 (Dick Thornburgh & Herbert S. Lin eds., 2002) (noting that "detailed editorial control on a site-by-site basis for all sites in the vendor's database is not possible in practice"). Thus, libraries that purchase blocking software effectively cede to their software vendors the decision about which sites to block. *See* Lawrence Lessig, *What Things Regulate Speech: CDA 2.0 vs. Filtering*, 38 Jurimetrics J. 629, 657 (1998).

B. Commercial Blocking Software Regulates Speech in a Systematically Overbroad Fashion and Creates a Significant Danger of Viewpoint Discrimination.

The abdication of decision-making responsibility to the creators of commercial blocking software required by CIPA poses great danger of unnecessary suppression of speech and viewpoint discrimination.

1. Commercial Blocking Software Purposefully Blocks Protected Speech

Commercial blocking software typically permits consumers to block several dozen categories of Internet

content. *See ALA*, 201 F. Supp. 2d at 429-30. There is, however, "no category definition used by filtering software companies [that] is identical to CIPA's definitions of visual depictions that are obscene, child pornography, or harmful to minors." *Id.* at 429. Indeed, commercial blocking software does not even offer categories limited to obscenity, child pornography, or visual depictions that are harmful to minors. The closest approximations are categories such as "Adult Material," "Adults Only," "Adult/Sexually Explicit," "Extreme/Obscene/Violence," "Pornography," "Sex," "Kids' Sites," "For Kids," "Illegal/Questionable," "Tasteless," and "Tasteless/Gross." *Id.* at 429-30.

This omission is not surprising. Commercial blocking software is not designed to comply with governmental obligations under the First Amendment. Like any commercial product, blocking software is designed to satisfy the market's primary customers, which in the case of blocking software are parents who want to protect their children from all sexually explicit material, businesses that want to keep their employees focused on work and maintain a hospitable atmosphere in the office, and religious groups that want to spare their members exposure to material that offends their values. For example, one blocking-software company provides services to several religious Internet service providers and web sites, such as Christianity.com, Christian.net, and Crosswalk.com. *See* Nancy Willard, *Filtering Software: The Religious Connection* (2002), *at* http://www.ntia.doc.gov/ntiahome/ntiageneral/cipacomments/pre/willard/FSRCreport.htm. Another company provides blocking services to 711.net/Global Internet Ministries, Christian Purity, and What Would Jesus View. *See id.* And a third company offers a product that the American Family Association has repackaged as the "American Family Filter" and described as "built on the Christian princip[le] of holiness." *Id.* (quoting http://www.afafilter.com/about.asp).

2. Commercial Blocking Software Is Inherently Overbroad

Blocking-software vendors have an economic incentive to err on the side of overblocking. When a consumer is improperly denied access to a web site by blocking software, he is unlikely to know that he has been denied access to anything of value and therefore is unlikely to become upset. By contrast, when a sexually graphic image appears on the screen of a consumer who has attempted to block such material, there is a good chance that the consumer will become incensed and complain to his blocking-software vendor. *Cf. Youth, Pornography, and the Internet, supra*, at 287 (noting that libraries "tend to receive many more complaints from parents and the community about sites that are not filtered (i.e., complaints about underblocking) than about sites that are filtered improperly (i.e., complaints about overblocking)"). As a consequence, companies offering blocking software have a natural "desire to 'err on the side of caution' by screening out material that might be offensive to some customers." *ALA*, 201 F. Supp. 2d at 433; *see also Youth, Pornography, and the Internet, supra*, at 287 (noting that blocking software companies "have many incentives to err on the side of overblocking and few to err on the side of underblocking"); Nancy Willard, *supra* ("Filtering companies generally perceive the risks of failing to block access to inappropriate material as more significant than the risks of blocking access to appropriate material.").[3]

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[3] This tendency to err on the side of overblocking may explain why some software vendors block access to so-called "loophole" sites. Loophole sites include archives of Internet content such as the Internet Archive, a digital library of the Internet containing a historical collection of web pages, *see* http://www.archive.org, and the "caches" of web pages indexed by Google's popular search engine. Because web sites are constantly changing their content and being removed from their original Internet addresses, *see ALA*, 201 F. Supp. 2d at 419, such loophole sites are often the only source for older materials. But

In addition, as this Court has recognized before, institutions regularly engaged in suppressing speech tend to develop a bias in favor of suppression. When a "framework creates an agency or establishes an official charged particularly with reviewing speech," it "breed[s] an 'expertise' tending to favor censorship over speech." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 760 (1988); *see also Freedman v. Maryland*, 380 U.S. 51, 57-58 (1965) ("Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression."). For this reason as well, commercially developed blocking software has an inherent tendency to block more speech than necessary.

3. Commercial Blocking Software May Facilitate Viewpoint Discrimination

There is also reason to fear that commercially developed blocking software will systematically discriminate against certain viewpoints. Although the heuristics employed by blocking software are generally unknown, *amici* are aware of one product that used the presence of words such as "lesbian," "gay," and "homosexual" in identifying sites dealing with sexuality. That product assigned points to particular words or phrases based on the inherent offensiveness of the word and its context. It treated the words "lesbian" and "homosexual" as inherently offensive, and for each appearance of those words a web page received

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loophole sites assign new Uniform Resource Locators ("URLs") to the content they contain, and therefore represent a potential way around a blocking product's list of prohibited sites. *See ALA*, 201 F. Supp. 2d at 434-35. To combat this problem, some vendors simply block access to the loophole sites, thereby suppressing a massive amount of unobjectionable and constitutionally protected content.

five points; sites accumulating 50 points were normally blocked. Words like "lesbian" and "homosexual," however, are likely to appear dozens of times in sites that discuss social and political issues of concern to the lesbian and gay communities, but have little to do with sexuality, much less obscenity and pornography. Thus, under the heuristics employed by this company, core political speech could be blocked by a category that a library might use to comply with CIPA.

Moreover, there is evidence that other blocking software routinely denies access to gay and lesbian sites that contain core political speech. To take an example, N2H2, seller of a popular blocking product called Bess, has blocked a number of sites having to do with gay and lesbian issues under the category "Sex." These include sites dedicated to the problem of harassment of gays (http://www.inform.umd.edu / EdRes / Topic / Diversity / Specific/ Sexual_Orientation / Reading/News/harassment); gay relationships (http://content.gay.com/channels/relationships); and the "Queer as Folk" television show (http: //www.sho.com/queer). By discriminating in this manner against certain viewpoints, the secret criteria used in blocking software "may result in hidden censorship." H.R. Rep. No. 105-775, at 19-20 (1998).

Nor is the risk of viewpoint discrimination confined to the software companies. There is also a danger that libraries could use the "technology protection measure" requirement as cover for viewpoint discrimination. Because CIPA does not place any limits on what type of blocking software a library may use, a librarian who was somehow aware of a systematic bias in a given blocking product could select software that discriminates against certain viewpoints based upon his or her own private agenda. Moreover, because the blocking software companies do not disclose the criteria that they use, the public would have little way of learning what had been done. Thus, commercial blocking software creates

the danger of purposeful as well as unwitting viewpoint discrimination by libraries.

C. As a Suspect Method of Regulating Speech, CIPA's "Technology Protection Measure" Requirement Should Be Subject to Strict Scrutiny

This Court has long recognized that certain methods of regulating speech pose a special danger to free speech and should therefore be subject to special scrutiny. Congress's attempt in CIPA to regulate speech by effectively forcing libraries to use technology produced by the market poses a similar danger and should therefore be subject to strict scrutiny.

Few propositions are more deeply ingrained in constitutional law than the proposition that one particularly dangerous method of regulating speech—prior restraint—is subject to special scrutiny. *See, e.g., Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976) ("[I]t is . . . clear that the barriers to prior restraint remain high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it."); *Near v. Minnesota*, 283 U.S. 697, 713-18 (1931) (describing the "deep-seated conviction that such restraints" are generally unconstitutional). As this Court has explained, a state is "not free to adopt whatever procedures it pleases for dealing with obscenity" because "[t]he administration of a censorship system . . . presents peculiar dangers to constitutionally protected speech." *Freedman*, 380 U.S. at 57 (quotation omitted). *See generally* Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp. Probs. 648 (1955). It is therefore well settled that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

For example, licensing provisions that require prior approval of speech have long been recognized as "prior

restraint[s] on speech" and are therefore subject to careful scrutiny, particularly where specific standards are lacking to guide the official doing the licensing. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130-31 (1992); *see also City of Lakewood*, 486 U.S. at 763 (noting that the danger of "content and viewpoint censorship . . . is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official"). This Court has also considered other forms of regulation permitting public officials to review speech prior to its distribution to the public to be forms of censorship that should be treated as prior restraints and subjected to special scrutiny. *See, e.g., United States v. Thirty-Seven Photographs*, 402 U.S. 363, 367-75 (1971) (treating seizure of allegedly obscene photographs as a prior restraint); *Blount v. Rizzi*, 400 U.S. 410, 416-17 (1971) (postal regulations allowing the Postmaster General to halt use of mails for obscene material). Moreover, in so doing, the Court has looked to the real-world effects of regulatory schemes to determine whether they act, as a practical matter, as prior restraints. *See Bantam Books*, 372 U.S. at 59-61, 70 (finding that obscenity-review commission "in fact . . . subject[ed] the distribution of publications to a system of prior administrative restraints"); *Near*, 283 U.S. at 712 (finding that abatement of newspapers publishing obscene or scandalous material as nuisances "operates . . . to put the publisher under an effective censorship).

CIPA's requirement that libraries wishing to make broad Internet access available to their patrons employ a commercially developed "technology protection measure" poses at least as great a risk of "freewheeling censorship," *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975), as previously recognized prior restraints. Like pre-publication censorship, blocking software reviews speech for its propriety, and like the local officials granted licensing authority in *City of Lakewood* and *Forsyth County*, the developers of blocking software enjoy unfettered discretion

to select speech for suppression. Indeed, commercial blocking software is even more troubling because it effectively delegates censorship decisions to private individuals, who, unlike mayors, police officers, censor boards, and other public officials entrusted with issuing licenses, have no obligation to uphold the Constitution or narrowly tailor their censorship to comply with the First Amendment. To the contrary, as demonstrated above, blocking-software vendors may have powerful economic incentives to err on the side of suppressing more speech rather than less. *See supra* p. 7; *see also* Bernard W. Bell, *Filth, Filtering, and the First Amendment: Ruminations on Public Libraries' Use of Internet Filtering Software*, 53 Fed. Comm. L.J. 191, 236 (2001) ("The kinds of political constraints that cabin public officials' actions do not similarly constrain actions by private entities."). The efforts of private software developers therefore deserve none of the deference traditionally due the efforts of the legislature or other public officials. *Cf. Reno*, 521 U.S. at 876 (stressing "that *Congress* has designed its statute to accomplish its purpose 'without imposing an unnecessarily great restriction on speech'" (emphasis added) (quoting *Denver Area Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996))). Moreover, unlike licensing schemes that provide for judicial review of decisions to block speech, *see, e.g.*, *Freedman*, 380 U.S. at 59-60, the use of blocking software proceeds without any "judicial determination." *ALA*, 201 F. Supp. 2d at 429. Thus, if any technique for regulating speech deserves judicial suspicion, it is CIPA's "technology protection measure."

The Government argues that strict scrutiny would be "incompatible with the discretion that public libraries must have to fulfill their traditional missions." Gov't Brief at 11. A library does not, however, exercise its traditional discretion to select the library's offerings when it adopts a "technology protection measure." *See* Frederick Schauer, *The Supreme Court 1997 Term—Comment: Principles,*

Institutions, and the First Amendment, 112 Harv. L. Rev. 84, 115 (1998). Indeed, because librarians normally have little way of knowing how commercially developed blocking software works, *see supra* p. 5, they do not exercise any meaningful discretion in implementing CIPA's mandate. Instead, those librarians who wish to give their patrons broad Internet access while still complying with CIPA are forced to purchase blocking software from commercial vendors, who exercise discretion unfettered by the professional standards of librarians or their commitment to free speech. Thus, far from showing that a lax standard of review is appropriate, the Government's focus on the "traditional missions" of librarians underscores the need for searching review of CIPA's "technology protection measure" requirement.

CONCLUSION

Whether or not this Court finds that libraries create a public forum by offering public access to the Internet, CIPA's "technology protection measure" should be subject to strict scrutiny.

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IN THE

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UNITED STATES OF AMERICA, ET AL.,
Appellants,

v.

AMERICAN LIBRARY ASSOCIATION, INC., ET AL.,
Respondents.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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BRIEF FOR *AMICI CURIAE* THE CLEVELAND PUBLIC LIBRARY, THE RHODE ISLAND LIBRARY ASSOCIATION, AND THIRTEEN DEANS AND DIRECTORS OF UNIVERSITY SCHOOLS OF LIBRARY SCIENCE IN SUPPORT OF RESPONDENTS

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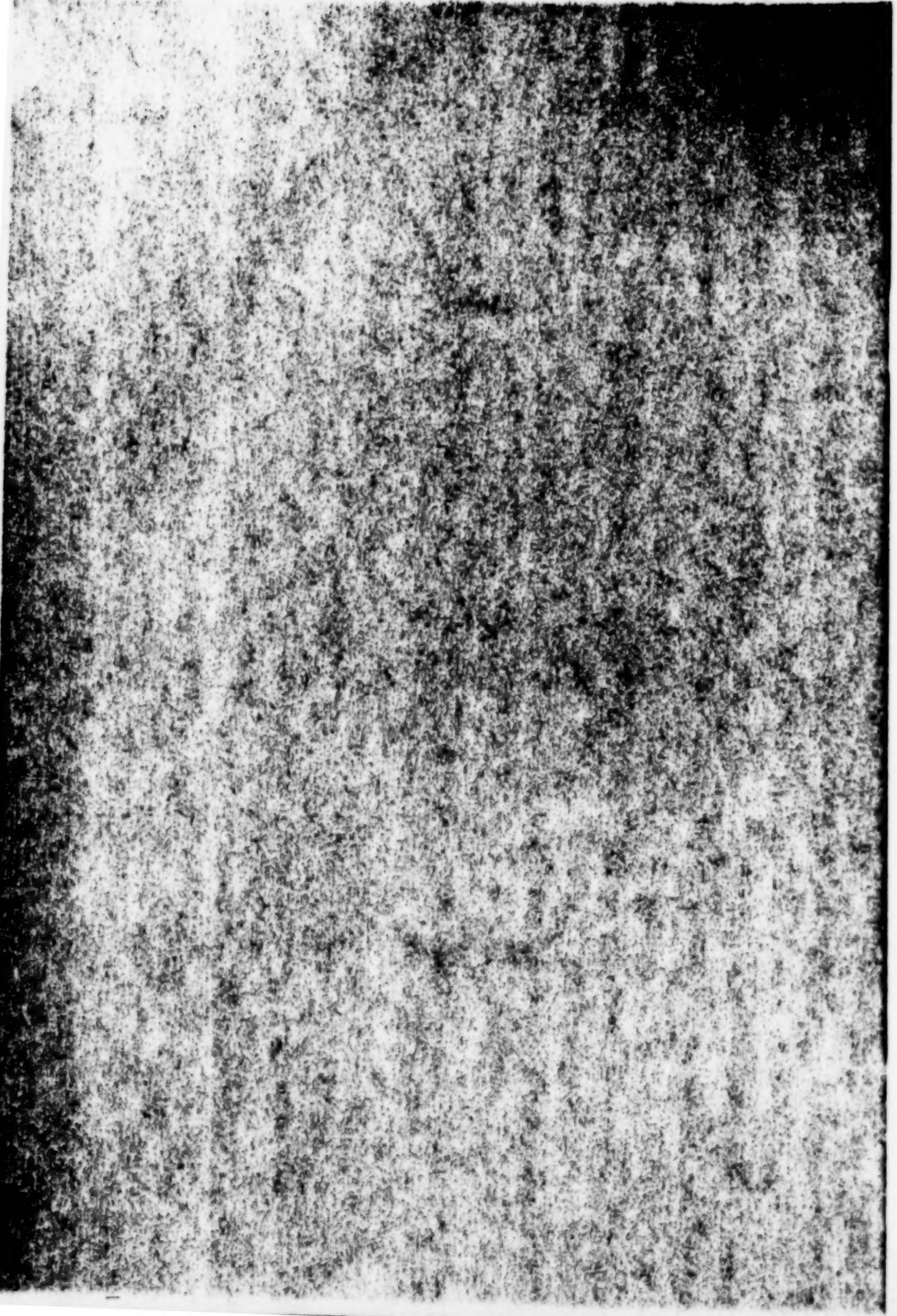

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INTEREST OF AMICI[1]

The individual *amici* are the *Cleveland Public Library*, the *Rhode Island Library Association* (a professional association of librarians, library trustees, and library supporters whose purpose is to promote the profession of librarianship),

[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity other than *amici curiae*, their members, and their counsel made a monetary contribution to the preparation or submission of the brief. The written consent of all parties to the filing of this brief has been filed with the Clerk of this Court.

Dean Michael Eisenberg of the Information School of the University of Washington, *Dean Gustav Friedrich* of the School of Communications, Information and Library Science at Rutgers University, *Dean Ronald Larsen* of the School of Information Sciences of the University of Pittsburgh, *Director Louise S. Robbins* of the School of Library and Information Studies of the University of Wisconsin-Madison, *Director W. Michael Havener* of the Graduate School of Library and Information Studies of the University of Rhode Island, *Dean Michael E.D. Koenig* of the Palmer School of Library & Information Science at the University of Long Island, *Dean Beth M. Paskoff* of the School of Library and Information Science at Louisiana State University, *Director David Eichmann* of the School of Library and Information Science of the University of Iowa, *Dean Philip M. Turner* of the School of Library and Information Sciences of the University of North Texas, *Director Consuelo Figueras* of the Graduate School of Information Sciences and Technologies of the University of Puerto Rico, *Dean Raymond F. von Dran* of the School of Information Studies at Syracuse University, *Dean Joanne Gard Marshall* of the School of Information and Library Science at the University of North Carolina at Chapel Hill, *Director Vicki L. Gregory* of the School of Library and Information Science at the University of South Florida, and *Dean Prudence W. Dalrymple* of the Graduate School of Library and Information Science at Dominican University. As members of the nation's library community, *amici* agree with the decision of the district court below and believe that mandatory filtering of Internet access in public libraries is antithetical to the historical mission of public libraries and destructive of their traditional functioning. Accordingly, they believe that the decision of the district court should be affirmed.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case may appear to present an issue about the availability of a narrow category of expression ("harmful to minors" material) through a single medium (the Internet), but in fact it implicates an issue of great importance to the intellectual and political life of our nation: the role of the public library, long a vital center for the acquisition of information and the exploration of ideas. As a condition of receiving federal funds, Congress has—with the Children's Internet Protection Act ("CIPA"), Pub. L. No. 106-554, 114 Stat. 2763 (2000)—insisted that public libraries affirmatively censor constitutionally-protected material. By demanding that libraries be censors and devote resources—not to facilitating—but to interfering with patrons' pursuit of information and ideas, Congress has subverted the role of librarians and public libraries and violated the First Amendment rights of library patrons.

Public libraries exist to meet the information needs of their patrons, not to censor information in accordance with a predetermined agenda. Imposition of mandatory filtering on public libraries impairs the ability of librarians to fulfill the purpose of public libraries—namely, assisting library patrons in their quest for information—and distorts public libraries' traditional function by interfering with local control over the management of their resources. Mandatory filtering also imposes unwarranted restrictions on the use of the Internet, a library resource not subject to the spatial and budgetary constraints that typically restrict print collections. Far from being "just another collections decision," mandatory censorship of the Internet proscribes access to constitutionally-protected expressive materials without any resource-scarcity justification. Moreover, through ingenuity and adherence to the long-established values that guide the profession of library science, public libraries have developed techniques for protecting minors from harmful materials on the Internet that are more effective than mandatory filtering.

For all of these reasons, CIPA is unconstitutional. Congress cannot condition public libraries' receipt of funds on their agreement to violate the First Amendment rights of library patrons. The public library is the quintessential forum for the *receipt* of information. With respect to a medium like the Internet that is subject to virtually no resource limitations, content-based exclusions of constitutionally-protected material are subject to strict scrutiny. CIPA cannot survive such scrutiny because mandatory filtering is not narrowly-tailored to achieve a compelling purpose. Specifically, CIPA is both grossly overinclusive and significantly underinclusive in the material it censors, and prohibits access by adults to information they have a constitutional right to receive. Less restrictive approaches, including those already used by public libraries throughout the United States, are as or more effective in protecting children while interfering far less with the rights of adults.

ARGUMENT

I. THE MISSION OF PUBLIC LIBRARIES AND THE ROLE OF LIBRARIANS SERVE THE OVERRIDING PURPOSE OF ENSURING THAT INDIVIDUAL LIBRARY PATRONS OBTAIN THE INFORMATION THEY SEEK.

The public library serves a unique and critical role in our democratic society: it is the "quintessential locus of the *receipt* of information." *Kreimer* v. *Bureau of Police*, 958 F.2d 1242, 1255 (3d Cir. 1992) (emphasis added). People turn to the public library when they wish to explore a broad area of knowledge or research a particular question. Assisting library patrons in their pursuit of information is the singular institutional purpose of public libraries, the mission of public librarians, and the animating principle of their collections development decisions. *See* G. Edward Evans, *Developing Library Collections* 19 (1979) ("[P]roviding the information that a patron wants, regardless of its format or location is . . . the reason for the existence of libraries, and indeed, of librarians."). Due to this longstanding institutional commitment to the information needs of library patrons, public libraries are literally "designed for freewheeling inquiry," *Board of Educ.* v. *Pico*, 457 U.S. 853, 915 (1982), and are "mighty resource[s] in the free marketplace of ideas." Among all our public institutions, public libraries are "specially dedicated to broad dissemination of ideas." *Minarcini* v. *Strongsville*, 541 F.2d 577, 582-83 (6th Cir. 1976).

CIPA disregards this unique role of public libraries. Far from identifying the information needs of patrons as the public library's *raison d'etre*, CIPA would cast public libraries and librarians as moral guardians and censors—and Appellants and their *amici* defend it in just these terms. *See, e.g.*, App. Br. 21-22 (librarians should play the role of gatekeepers who "give the public, not everything it wants, but the best of what it will read or use to advantage" (internal quotation marks and citation omitted)). This is not merely incorrect as a matter of librarianship; it also subverts the democracy-promoting premise of public libraries—that they exist to serve individuals' interests in obtaining information, not a governmental agenda or orthodoxy. *See* William A. Katz, *Collection Development: The Selection of Materials for Libraries* 105 (1980) (librarians select materials on the basis of what the "library audience will enjoy reading," not "on the basis what people *ought* to read" or "what they *ought not* to read" (emphases in original)). Contrary to the assertions of Appellants and their *amici*, the information needs of patrons are fundamental to the mission of public libraries and the role of librarians.

The mission of public libraries has long been so defined. *See* Robert N. Broadus, *Selecting Materials for Libraries* 36 (1981) ("Go back as far as 1894. The librarian of the St. Louis Public Library states his position in simple terms: 'In the first place, we try to provide the books people want—not those we think they ought to read.'"). Both the American Library Association ("ALA") Library Bill of Rights, first adopted in 1948, and the ALA Freedom to Read Statement,

which dates to 1953, affirm that libraries should provide a wide array of materials based on patrons' informational needs. ALA Library Bill of Rights, *available at* http://www.ala.org/ work/ freedom/ lbr.html; ALA Freedom to Read Statement, *available at* http://www.ala.org/alaorg/oif/ freeread.html. A broad and balanced collection obviously is more likely to contain information useful to and desired by a public library's varied patron base, and to afford adequate coverage of all sides of important issues. *See* Broadus, *supra*, at 46 ("In order to be fair and to insure the presentation of as much truth as possible, there should be some materials on all (or just about all) sides of controversial issues.").

To serve patrons' informational needs fully, public libraries embody "society's commitment to the preservation and transmission of the cultural record." *See* Vision & Mission Statement, University of Wisconsin-Madison School of Library and Information Studies, *available at* http://polyglot.lss.wisc.edu/slis/about/vision.html. For this reason, public libraries are a "source of last resort" for materials from our own or earlier times that are out of print, too expensive for purchase, or unavailable for any other reason.

This Court has recognized that universities serve as "traditional sphere[s] of free expression" that are "fundamental to the functioning of our society." *Rust* v. *Sullivan*, 500 U.S. 173, 200 (1991). Public libraries, too, undergird our system of free expression by enabling a "*large* segment of citizens [to] inform themselves." Broadus, *supra*, at 33 (emphasis in original). Indeed, public libraries may reach even more broadly than universities because they are free.

Appellants are simply wrong that libraries typically subordinate patrons' information needs to their own official agenda of promoting "worthwhile and appropriate" reading. App. Br. 12, 20-21. To the contrary, librarians are committed to the principle that patrons "should be able to find the reading matter and other media formats which [they] want[], educational or not." Broadus, *supra*, at 37. Indeed, without

rendering judgment or imposing content-based limitations on the materials sought, public libraries "routinely provide patrons with access to materials not in their collections through the use of bibliographic access tools and interlibrary loan programs." *American Library Ass'n* v. *United States*, 201 F. Supp. 2d 401, 421 (E.D. Pa. 2002). If a public library does not have a resource in its collection, librarians assist patrons in obtaining access to the source. The *sole* exception to this practice is where the work is clearly illegal. *Id.*[2]

Thus, the first and central principle governing public libraries' provision of reference services is "to provide the information *sought by the user*." 2 William A. Katz, *Introduction to Reference Work* 14 (2001) (emphasis added). Rather than assume that a particular work has little value for *every* patron, a reference librarian assisting a patron seeking a source "ask(s) questions that help define the user's own

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[2] Thus, *amici* National Center for Children and Families, *et al.* are simply incorrect when they assert that "[l]ibraries have no right, nor duty, to provide any and all available information to patrons." *Amici* Br. 21. Nor does any evidence in the record support Appellants' assertion that the mission of public libraries invariably *requires* the exclusion of sexually-explicit work or any other category of constitutionally-protected speech. App. Br. 22. To the contrary, if some libraries do not maintain sexually-explicit works, this may simply reflect the lack of articulated demand for such materials from the community. *See* Katz, *Collection Development*, *supra*, at 187 ("[I]f there really is popular demand for, say, *Playboy*, [the title] should be purchased. . . . Any heavily read title should be given consideration, no matter what its editorial content. It should be accepted or rejected on community need.").

In any event, including such materials in a public library's collection is simply not inconsistent with the historical and traditional mission of public libraries. The Library of Congress, for instance, collects sexually-oriented materials consistently with its mission of "preserv[ing] a universal collection of knowledge and creativity for future generations." *See* About the Library of Congress, *available at* http://www.loc.gov/ about (last visited Feb. 8, 2003); *see also* Library of Congress Online Catalog, *available at* http://catalog.loc.gov/ (showing listings for Playboy, Hustler, and Penthouse magazine) (last visited Feb. 8, 2003).

evaluative criteria" and focuses the information search on the user's specific needs. Ellen D. Sutton & Leslie Edmonds Holt, "The Reference Interview," *in* Richard E. Bopp & Linda C. Smith, *Reference and Information Services: An Introduction* 47 (2d ed. 1995).

A second and related tenet of library science is that librarians must exercise their professional judgment without giving sway to personal bias. The vast majority of public libraries have adopted the ALA Library Bill of Rights, which states that library sources "should not be proscribed or removed because of partisan or doctrinal disapproval." ALA Library Bill of Rights, *supra*; *see also* ALA Code of Ethics, *available at* http://www.ala.org/alaorg/oif/ethics.html ("VII. We distinguish between our personal convictions and professional duties and do not allow our personal beliefs to interfere with fair representation of the aims of our institutions or the provision of access to their information resources.") (last modified Dec. 13, 2001); Guidelines for Behavioral Performance of Reference and Information Services Professionals 3.9, *available at* http://www.ala.org/rusa/stnd_behavior.html. ("As a good communicator, the librarian . . . [m]aintains objectivity and does not interject value judgments about subject matter or the nature of the question into the transaction.") (last modified Mar. 1, 2002).

The principle of neutrality in the exercise of professional judgment is so crucial that librarians have an ethical duty not only to refrain from denying access to information because of disapproval of its content, but also "to contest encroachments upon th[e] freedom [to read] by individuals or groups seeking to impose their own standards or tastes upon the community at large." ALA Freedom to Read Statement, *supra*, at 3; ALA Code of Ethics, *supra* ("II. We uphold the principles of intellectual freedom and resist all efforts to censor library resources."); *see also* 201 F. Supp. 2d at 421 ("Reference librarians are trained to assist patrons without judging the patron's purpose in seeking information, or the content of the information that the patron is seeking.").

For this reason, *amici* Greenville, SC *et al.* are incorrect when they assert that "[t]he essence of librarianship is, in short, inconsistent with one of the basic tenets of traditional First Amendment jurisprudence that content-based decisions regarding speech are suspect." *Amici* Br. of Greenville, SC, *et al.* 5-6. Librarians do *not* make content-based decisions reflecting their own values or tastes and certainly not reflecting a government-imposed orthodoxy. To the contrary, the principles described above ensure that librarians' decisions about collection-building are driven by the overriding purpose of meeting patrons' information needs. *See* Broadus, *supra*, at 30 ("The first rule in selection is that libraries exist for patrons, not for librarians.").

Because collections decisions are driven by the needs and interests of patrons, they are necessarily made at the local level, closest to the patrons themselves. *See* Evans, *supra*, at 19 ("Every library's collection . . . must be assembled and developed with its unique patron community in mind."); Katz, *Collections Development*, *supra*, at 88 ("[T]he librarian must always be careful not to use national assumptions for local selection."). Moreover, contrary to Appellants' assertion, App. Br. 32, delegation of collections decisions to third parties is both rare and highly circumscribed in order to ensure that collections decisions are made by individuals with knowledge about and experience with the needs of the community. *See* Katz, *Collection Development*, *supra*, at 111-12 ("No matter what system is employed the librarian should have the final professional word in the selection process."); *see also* 201 F. Supp. 2d at 421 (libraries "do not generally delegate their selection decisions to parties outside of the public library or its governing body").

Critically, collections decisions are *not* analogous to mandatory filtering software. Professional and ethical standards guide collection development, unlike the decisions that

determine which web sites filtering software will block, which are unconstrained by such standards. *See id.* at 433; *see also* Rhode Island Library Ass'n Intellectual Freedom Committee Report on the Children's Internet Protection Act 2 (Mar. 25, 2001) ("RILA Report") ("Filtering . . . . is unable to make subjective or legal decisions, and therefore, does not know and often does not recognize the difference between illegal and legal speech."). Most important, unlike the censorship mandated by CIPA, collections decisions do not place obstacles in the way of patrons' access to information. To the contrary, because of the availability of interlibrary loans and the Internet itself, libraries can and will facilitate access to materials their own institutions do not maintain. In short, librarians are not censors, but facilitators of patrons' access to the world of information and expressive materials. CIPA, in contrast, mandates censorship.

II. CIPA Subverts The Traditional Function Of Public Libraries.

As the foregoing demonstrates, the provision of unfettered Internet access by public libraries is entirely compatible with their traditional mission, and this mission requires the provision of such access without imposing mandatory filtering. As this Court has recognized, the Internet offers individuals an expansive "new marketplace of ideas," *Reno* v. *ACLU*, 521 U.S. 844, 885 (1997), allowing them to explore contents "as diverse as human thought." *Id.* at 852 (citation omitted). "No other medium has provided us with so much information so easily." ALA Libraries & the Internet Toolkit at 3, *available at* http://www.ala.org/alaorg/oif/2002toolkit.pdf.

For this reason, Internet access is virtually ubiquitous in public libraries. As of 2000, 95% of "all public libraries [were] provid[ing] public access to the Internet." 201 F. Supp. 2d at 422 (citing Bertot & McClure, *Public Libraries and the Internet 2000*, Report to the Nat'l Comm'n on Libraries and Information Science). Fully 10% of Americans

who access the Internet do so from their public library, *id.*, and just as the public library is a "source of last resort" for hard-to-find materials, the public library is also a critical source of Internet access for many lower-income Americans. *See id.* at 422 ("About 20.3% of Internet users with household family income of less than $15,000 per year use public libraries for Internet access."); ALA Libraries & the Internet Toolkit, *supra*, at 21 ("[F]or people without Internet access at home, school or work, public libraries are the number one point of access" (citing *Falling Through the Net*, NTIA 2000)). Consistent with the principles described above, 93% of public libraries provide this Internet access without imposing mandatory filtering on their patrons' use. *See* 201 F. Supp. 2d at 426.

By requiring the installation of filtering software on all Internet-connected computer terminals in the library, including both staff terminals and those for use by the public, *see* 47 U.S.C. § 254(h)(6)(C); *In re Federal State Joint Bd. on Universal Serv.: Children's Internet Protection Act*, CC Docket No. 96-45, Report and Order, FCC 01-120, ¶ 30 (Apr. 5, 2001), CIPA subverts the traditional functioning of public libraries in three significant ways: (1) it mandates unwarranted restrictions on an information resource, the Internet, that is not subject to budgetary and space limitations comparable to those that limit a library's print collection; (2) it supersedes local decision-making and replaces it with the decisions of third persons without training in library science; and (3) it impairs the ability of librarians to aid patrons seeking information. Indeed, far from functioning like "just another collections decision," CIPA is fundamentally incompatible with the historic mission and long-standing operation of public libraries.

First, CIPA flatly prohibits patrons from accessing a wide variety of materials through public library Internet facilities, and this censorship is completely unjustified according to library selection standards. As plaintiffs' trial expert made clear, "the main reason that selection is done in the first

place . . . is to make the best use of scarce budget and space resources. Librarians select in an environment of scarcity." Expert Witness Rep. of Mary K. Chelton ¶ 14. Absent the constraints of space and cost, no principle of librarianship justifies excluding material from a library's collection. Such scarce budget and space limitations do not impinge on the provision of Internet access as they do on a library's print collection. Once a library has purchased the Internet service, it need not pay extra for additional web sites. The addition of web sites to the Internet does not occasion a need for more computer terminals, the way adding books to a collection requires more shelf space.[3] Thus, application of content-based selection criteria to the Internet is not warranted by the professional standards that govern librarians. CIPA distorts the traditional functioning of libraries by requiring content restrictions in the absence of the historically critical factors of limited space and budget.

Second, in CIPA, Congress simply overrides the local, professional decision-making that is the hallmark of a public library's operation. Appellants blithely turn this situation on its head when they suggest that "[a] public library's judgment that [filtering] best serves its historic mission is entitled to substantial deference . . . ." App. Br. 30. Of course, if public libraries filter Internet access pursuant to CIPA, they will *not* have made a judgment that filtering best serves their historic missions; rather, they will be filtering because Congress, pursuant to CIPA, requires them to do so. Appellants cannot defend CIPA by invoking the deference due professional judgments made by local librarians. CIPA's central facet is its disregard for such judgments, and for local librarians' ex-

[3] For this reason, the imposition of time limits on Internet access at public libraries does not "constrain [] libraries' ability to provide patrons with unrestricted Internet access," 201 F. Supp. 2d at 465 n.25, in the same way that spatial and budgetary restrictions circumscribe a library's print collection.

pertise about what kinds of resources best serve the interests of their communities.

Third, CIPA disrupts the traditional function of public libraries by interfering with librarians' ability to aid patrons. CIPA requires filtering software to be installed even on *staff* computer terminals. *See* 201 F. Supp. 2d at 413. This obviously prevents librarians from aiding patrons who encounter a blocked website. For instance, librarians cannot even access blocked web sites to ascertain whether they actually contain unprotected speech.[4] Moreover, librarians cannot resort to other resources to confirm the unprotected nature of the blocked web site because "no one but the filtering companies has access to the complete list of [blocked] URLs in any category." *Id.* at 430. Indeed, the filtering software companies consider these lists to be "proprietary information" and therefore keep them secret. *Id.* Librarians obviously cannot assist patrons effectively when they are excluded from the web site filtering process, and when that process is conducted according to a set of procedures that deviates from librarians' professional standards.

Indeed, by relegating the censorship decisions to filtering software companies, *see id.* at 433, CIPA entrusts content-based decisions to processes uninformed by the rigorous professional standards to which librarians adhere. For example, "one [filtering software] company admitted to categorizing some Web pages without any human review." *Id.* The other filtering software companies employ "limited" staff whose training and qualifications are not reflected in the record and who have not been "instruct[ed] to take community standards into account when making categorization deci-

[4] For this reason, *none* of the libraries that use filtering software proffered by Appellants at trial install filtering software on staff terminals. 201 F. Supp. 2d at 427. Indeed, "[a] few of the defendants' proffered libraries represented that individual librarians would have the discretion to allow a patron to have full Internet access on a staff computer upon request . . . ." *Id.*

sions." *Id.* Moreover, as explained above, *supra* at 9, delegation of these kinds of substantive decisions is flatly contrary to established library practices.

For all of these reasons, the violence CIPA does to the traditional function of the public libraries requires that it be declared unconstitutional. "Where the [G]overnment uses or attempts to regulate a particular medium, we have been informed by its accepted usage in determining whether a particular restriction on speech is necessary for the program's purposes and limitations." *Legal Servs. Corp.* v. *Velasquez*, 531 U.S. 533, 543 (2001). "The First Amendment forb[ids] the Government from using the forum in an unconventional way to suppress speech inherent in the nature of the medium." *Id.* By forcing public libraries to exclude constitutionally-protected material based on official disapproval of its content and absent any space or resource justification, CIPA "suppress[es] speech inherent in the nature of the medium" and thus violates the First Amendment.

Appellants cannot rehabilitate CIPA by arguing that it merely "define[s] the limits" of the funding program at issue. App. Br. 50 (internal quotation marks and citation omitted). Appellants concede that in *Velasquez*, this Court struck down funding limitations on Legal Services Corporation ("LSC") lawyers because "the role of lawyers supported by [the] federal funds . . . is to advocate *against* the government, and there was thus an assumption that counsel would be free of state control." *Id.* at 51-52 (emphasis in appellants' brief). Public libraries, like LSC, are institutions whose independence from official orthodoxy is necessary to the service they provide. LSC happened to manifest this independence by advocating against the government, but nothing requires that opposition be the litmus test of independence. To the contrary, appellants have missed the "salient point" in *Velasquez*: what mattered was *not* that the LSC attorneys were arguing against the government, but rather that "the LSC program was designed to facilitate *private* speech, not to promote a governmental message." 531 U.S. at 542 (emphasis added). Here, as in *Velasquez*, the funding is intended to "facilitate private speech" activities—private decisions by library patrons to seek out and receive the information and expressive materials of their choice. Public libraries' neutral facilitation of those constitutionally-protected "private speech" activities is as central to libraries' traditional role as the oppositional speech of LSC lawyers was to theirs.

III. Libraries Already Safeguard The Interests Congress Seeks To Protect In CIPA, And The Vast Majority Of Libraries Do So Without Mandatory Filtering.

Public libraries share the legitimate goals expressed in CIPA. In particular, libraries do not intend to facilitate exposure to obscenity, child pornography, or, with respect to children, material that is "harmful," and thus legally proscribed. *See* ALA Libraries & the Internet Toolkit, *supra*, at 14 ("Librarians care deeply about children. Libraries already have policies and programs to ensure children have an enriching and safe online experience. And librarians are there to help them."). Public libraries overwhelmingly safeguard these interests without resort to mandatory filtering. *See id.* at 15 ("Education is more effective than filters—kids need to make good decisions about what they read and view, no matter where they are."); *see also* RILA Report at 2 ("Filtering software . . . gives parents and guardians a false sense of security" because it "often fails to block the type of site it claims it will block."). Of particular significance is the fact that public libraries achieve these results using techniques that are consistent with their unique purpose and function.[5]

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[5] In addition to being both over- and underinclusive with respect to material that is legally prohibited for children, the mandatory filtering software required by CIPA fails to take into account the important interest served when minors learn techniques for safely and efficiently using the Internet and other information technologies. "The Internet is good for kids. The Internet is changing how we live, learn, work and interact with

"Few libraries report having difficulties with people looking at pornography." ALA Libraries & the Internet Toolkit, *supra*, at 14. Moreover, public libraries have developed effective techniques for managing patrons' use of the Internet that enjoy wide currency. The vast majority of libraries opt for one or more of the following non-exhaustive list of alternatives to mandatory filtering:

- developing an Internet "use" policy and guidelines, which set forth the conditions for Internet use and the penalties for noncompliance, and which is posted prominently in the library;
- adopting special use policies that apply to children and facilitate parental control over children's Internet usage;
- providing training to patrons about how to use the Internet or guided searches of the Internet;
- optional linking from the library's home web page to a "white list" of recommended web sites that librarians have selected using the criteria and professional standards applicable to collection decisions generally;
- installing privacy screens on computer terminals with Internet access or placing such terminals in sunken desktops, both of which prevent passers-by from viewing the computer screen;
- continuing to innovate. For example, public libraries are experimenting with the use of personally-tailored, optional filtering in the form of "special library cards with computer chips that allow individual library users to control Internet access for themselves and their children." ALA Libraries & the Internet Toolkit, *supra*, at 25.[6]

one another. If today's children are to succeed, they must learn information literacy skills for ever-changing technologies." ALA Libraries & the Internet Toolkit, *supra*, at 14.

Unlike mandatory filtering, these techniques for managing patrons' use of the Internet are *not* "one size fits all." Rather, they permit public libraries individually to tailor the management of their resources to the needs and demands of their communities and in accordance with their professional standards. Thus, through creativity, perseverance, and adherence to the professional standards and values that have long guided the profession, public libraries have devised means of managing patrons' use of the Internet that are more effective than the mandatory filtering required by CIPA. Public libraries' choice to implement these techniques—in contrast to CIPA's federal fiat—is indeed a "judgment . . . entitled to substantial deference, not judicial suspicion." App. Br. 30.

IV. CIPA Is Unconstitutional Because It Induces Libraries To Violate The First Amendment Rights Of Their Patrons.

Internet access available in libraries is a designated public forum that provides general access for a class of speakers and listeners—web publishers and library patrons—and libraries therefore cannot exclude speakers or prevent the receipt of certain information on the basis of the content of the speech without satisfying strict scrutiny.[7] Because CIPA

[6] *Amici* American Center for Law and Justice *et al.*, plainly are wrong in asserting (Br. 10) that libraries would forgo providing Internet access altogether in the absence of mandatory filtering. As shown by the record in this case, 201 F. Supp. 2d at 424-26, public libraries do not simply discontinue offering Internet service in the absence of mandatory filtering. Rather, they adopt policies and practices that more effectively safeguard the interests they share with Congress than does CIPA.

[7] Any suggestion that striking down CIPA on First Amendment grounds threatens the independence and authority of public libraries is unfounded. *See Amici* Br. of Greenville, SC *et al.* 7 (application of the

fails strict scrutiny, Congress' requirement that public libraries implement mandatory filtering as a condition of receiving federal funds induces public libraries to violate the First Amendment rights of their patrons. *See South Dakota* v. *Dole*, 483 U.S. 203, 208 (1987) ("[O]ther constitutional provisions [like the First Amendment] may provide an independent bar to the conditional grant of federal funds.") (citations omitted).

The district court properly identified the forum at issue as "the library's provision of Internet access." 201 F. Supp. 2d at 455. Appellants do not currently dispute this definition of the forum. In their post-trial brief in the district court, Appellants argued for a narrow forum limited to "the content" that "the Internet delivers . . . to patrons." Def. Post-Trial Br. 19-20. On appeal, however, Appellants staked out a broader position: "any 'forum' that results from installing computers and connecting them to the Internet must take account of the fact that the computers and the access to the Internet they afford thereby become part of the resources of a library," App. Br. 39-40. Though Appellants appear to argue that this broader definition warrants reversal of the district court, defining the forum as the provision of Internet access *in the public library* is wholly consistent with the district court's holding.[8]

Appellants argue that the forum is properly classified as nonpublic; their argument is wrong, and the cases Appellants

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First Amendment will make the federal judiciary the "national Supreme Librarian"). *CIPA*, not the First Amendment, tramples the independence and authority of public libraries and casts Congress as the "national Supreme Librarian." Striking down CIPA on First Amendment grounds *restores*, rather than upsets, the traditional balance.

[8] Similarly, *amici* American Center for Law and Justice, *et al.* define the relevant forum as "the specific forum created when the library provides its patrons with Internet access." Br. 2. This also accords with the district court's holding.

cite are inapposite. Far from supporting Appellants' argument, *Arkansas Educational Television Commission* v. *Forbes* makes clear why a public library's provision of Internet access is a designated public forum. Unlike Internet access in public libraries, which creates "general access for a class of speakers," the televised debate in *Forbes* permitted only "selective access for individual speakers." 523 U.S. 666, 679 (1998). If a public library permitted patrons to access only the web sites of preapproved web publishers, for instance, *then* the forum at issue might be nonpublic, like the forum in *Forbes*. But computer terminals providing Internet access to a prescreened selection of web sites is not the forum at issue. The record is clear that the overwhelming majority of public libraries make the Internet available to adult patrons without content restrictions.

Appellants' reliance on *National Endowment for the Arts* v. *Finley* is misplaced for the same reason. This Court declined to classify the NEA funding program as a designated public forum because Congress had not permitted general access to the funding program to a class of speakers. Rather, as this Court explained, "[a]lthough the scarcity of NEA funding does not distinguish this case from *Rosenberger* [v. *Rector*, 515 U.S. 819 (1995), in which a university created a limited public forum], *the competitive process according to which the grants are allocated* does." 524 U.S. 569, 586 (1998) (citation omitted) (emphasis added). In other words, because artists had to compete for NEA funds, the funding program permitted only "selective access for individual speakers," *Forbes*, 523 U.S. at 679, and was therefore properly classified as a non-public forum. Again, such is not the situation at hand.

As the record in the district court makes clear, "the provision of Internet access within a public library in particular, is 'for use by the public . . . for expressive activity,' namely, the dissemination *and receipt* by the public of a wide range of information." 201 F. Supp. 2d at 457 (citation omitted).

Under standards promulgated by this Court, "[t]o create a [designated public] forum . . . the government must intend to make the property 'generally available' to a class of speakers." *Forbes*, 523 U.S. at 678 (citation omitted); *see also Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (the government creates a public forum when it "intentionally open[s] a non-traditional forum for public discourse."). One would be hard-pressed to find a designated public forum that more closely meets the criteria of having been "intentionally open[ed] . . . for public discourse" than Internet access in a public library. *Id.*

Appellants miss the point in asserting that "[a] public library does not make computers available to obtain material from the Internet in order to create a public forum for Web publishers to speak." App. Br. 26. Appellants ignore the district court's explicit finding that Internet access in public libraries creates a designated public forum for *both* the dissemination *and receipt* of information. *See* 201 F. Supp. 2d at 457. The First Amendment's protection of the right to receive information is so well-established as to be beyond question. *See, e.g.*, *Reno* v. *ACLU*, 521 U.S. 844, 874 (1997) (Communications Decency Act violates the First Amendment where it "effectively suppresses a large amount of speech that adults have a constitutional right to receive"); *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969) ("[The] right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society.") (citation omitted); *see also supra* at 4 (public libraries are a "quintessential locus" for the receipt of information); *cf. Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965) ("[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge."). Public libraries are of their essence a public forum for the receipt of information.

Having correctly identified the forum at issue and its character as a designated public forum, the district court properly determined that strict scrutiny applies because (a)

public libraries make Internet access generally available to a class of speakers or listeners, 201 F. Supp. 2d at 462, and (b) CIPA requires libraries to "single out for exclusion from the forum particular speech whose content is disfavored." *Id.* at 461. Application of strict scrutiny is mandated under this Court's precedents:

> [R]egulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny. . . . The second category of public property is the designated public forum, whether of a limited or unlimited character—property that the State has opened for expressive activity by part or all of the public. *Regulation of such property is subject to the same limitations as that governing a traditional public forum.*

International Soc'y for Krishna Consciousness, Inc. v. *Lee*, 505 U.S. 672, 678 (1992) (emphasis added) (citations omitted); *see also Perry Educators Ass'n* v. *Perry Local Educ. Ass'n*, 460 U.S. 37, 46 (1983) ("Although a state is not required to [create and maintain a designated public forum], as long as it does so it is bound by the same standards as apply in a traditional public forum."). "If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny." *Forbes*, 523 U.S. at 677 (citation omitted). The record below is clear that, because of intractable technological issues relating to the operation of filtering software, CIPA requires the content-based exclusion of substantial amounts of information that "falls within the class to which [the] designated public forum [at issue] is made generally available." *Id.* Because this exclusion is content-based, CIPA is subject to strict scrutiny. *Id.*

CIPA cannot survive such scrutiny because it clearly is not narrowly tailored. Filtering software is intrinsically inaccurate: "The commercially available filters on which evi-

dence was presented at trial all block many thousands of Web pages that are clearly not harmful to minors, and many thousands more pages that, while possibly harmful to minors, are neither obscene nor child pornography." 201 F. Supp. 2d at 475. In addition, material that is "harmful" as a legal matter certainly slips through. *Id.* at 406 (filtering software programs "are blunt instruments that . . . 'underblock,' i.e., fail to block access to substantial amounts of content that the library boards wish to exclude . . . ."). Moreover, because of inherent limitations in the nature of the technology, "it is currently impossible, given the Internet's size, rate of growth, rate of change, and architecture, and given the state of the art of automated classification systems, to develop a filter that neither underblocks nor overblocks a substantial amount of speech." *Id.* at 437.

The upshot is that Congress's requirement that public libraries use mandatory filtering software impermissibly restricts adults from receiving information to which they are constitutionally entitled access. Like the Communications Decency Act, which "on its face . . . simply restricted the distribution to minors of speech that was constitutionally unprotected with respect to minors," CIPA also "as a practical matter, . . . effectively prohibit[s] the distribution to adults of material that [is] constitutionally protected with respect to adults." *Id.* at 478. It is axiomatic that CIPA is not narrowly tailored if it "reduce[s] the adult population . . . to reading only what is fit for children." *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957). Moreover, given the clumsiness of filtering software, CIPA denies adults access to information that even *children* have a constitutional right to receive. Further, by mandating filtering software in lieu of more sensitive decisions by local librarians about how to protect children from "harmful" images, CIPA mandates the use a crude one-size-fits-all solution in lieu of a more sensitive community-by-community approach.

The complaints of *amici* that the district court misapplied strict scrutiny are meritless. First, *amici* Greenville, SC, *et al.* (Br. 13) object that "[b]efore a particular restriction can be held unconstitutional, the court must find that there is an alternative that is less restrictive with respect to the protected speech, but equally effective at regulating the unprotected speech." It is clear, however, that "the *government* bears the burden of proof in showing the ineffectiveness of less restrictive alternatives." 201 F. Supp. 2d at 480 (emphasis added). Moreover, this burden is "especially heavy." *Reno* v. *ACLU*, 521 U.S. at 879. In light of the glaring inadequacies of filtering software, and the successful community-sensitive alternative approaches already used by public libraries, *see supra* at 16-17, the district court's ruling that Appellants failed to carry this burden is manifestly correct. *See* 201 F. Supp. 2d at 484.

Second, *amici* American Center for Law and Justice, *et al.* take issue with the district court's conclusion that CIPA's disabling provisions do not cure the constitutional infirmity,[9] claiming that the district court's analysis amounts to awarding library patrons "a constitutional right to immediate, anonymous access to materials in a public library's collection . . . ." *Amici* Br. of Am. Ctr. for Law & Justice 18. This argument is incorrect. As the district court found, this provision unreasonably requires the patron to identify himself and his desire to access blocked material. Thus, it violates this Court's long-standing precept that "content-based restrictions that require recipients to identify themselves before being granted access to disfavored speech are subject to no less

[9] CIPA permits "[a]n administrator, supervisor, or other person authorized by the certifying authority . . . [to] disable the technology protection measure concerned, during use by an adult to enable access for *bona fide* research or other lawful purpose." 47 U.S.C. § 254(h)(6)(D) (E-rate); *see also* 20 U.S.C. § 9134(f)(3) (LSTA) (permitting both adults and minors to request that blocking be disabled).

scrutiny than outright bans on access to such speech." 201 F. Supp. 2d at 486 (citing, *inter alia*, *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965)). The constitutional problem is akin to that posed by laws that ban anonymous speech by unpopular speakers—it imposes an intolerable chilling effect on protected expressive activity. *See Talley* v. *California*, 362 U.S. 60, 64, 65 (1960); *Watchtower Bible & Tract Society* v. *Village of Stratton*, 536 U.S. 150 (2002); *see generally* David W. Ogden & Joel A. Nichols, *The Right to Anonymity Under the First Amendment*, 49 Fed. Lawyer 44 (Mar./Apr. 2002). Thus, identifying oneself to disable Internet filtering software is *not*, as *amici* suggest, like identifying oneself to obtain a library card or an interlibrary loan, *Amici* Br. of Am. Ctr. for Law & Justice 18, neither of which constitute content-based restrictions on access to speech and impose no chilling effect.

CONCLUSION

For the foregoing reasons, the judgment of the District Court for the Eastern District of Pennsylvania should be affirmed.

Respectfully submitted,

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